

(Unfair) Advantage: Damocles' Sword and the Coercive Use of Immigration Status in a Civil Society

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(UNFAIR) ADVANTAGE: DAMOCLES' SWORD AND THE COERCIVE USE OF IMMIGRATION STATUS IN A CIVIL SOCIETY

DAVID P. WEBER*

This article argues that the coercive use of immigration status or “status coercion” in civil proceedings and negotiations is fundamentally unethical and potentially illegal. For attorneys attempting to take advantage of unauthorized immigration status, such conduct very likely violates an attorney's ethical obligations under the Rules of Professional Responsibility and wrongfully takes advantage of an overly vulnerable population. For the judiciary, the article argues for a more proactive approach in maintaining the perception of fairness and justice in civil proceedings for all parties, regardless of immigration status. Additionally, for both legal and lay persons, status coercion may constitute the crime of extortion, and this article establishes how status coercion in most cases fills the required elements of extortion.

Part I of the article discusses in reported and unreported decisions the various fora where the described harms most often occur, including specifically commercial disputes, custody litigation and employment law issues where case outcomes have hinged on immigration status, and analyzes the impetus for the harms and the consequences, where appropriate, of the same. Part II of the article looks at ethical obligations, primarily those imposed by the Rules of Professional Responsibility on attorneys and the Model Code of Judicial Conduct for judges. Part II also looks in a more narrow perspective at potential criminal prohibitions and sanctions regulating this type of behavior affecting all parties. Part III suggests potential remedies available to the unauthorized immigrant in both civil and immigration proceedings when faced with status coercion. Part IV concludes that current ethical and legal obligations imposed on community members should be sufficient to prevent status coercion in commercial and civil contexts in the vast majority of cases. The article

* Assistant Professor at Creighton University School of Law. The author would like to give special thanks to Professors Stephen Legomsky and Peter Margulies for their thoughtful comments and advice, and to the organization ASISTA, which works closely with advocates of immigrant survivors of domestic violence and sexual assault, for sharing access to its members and their experiences. The author would also like to thank researchers Emily Solverson and Patrick Mack for their tireless assistance.

concludes that as unauthorized immigrants are one of the most vulnerable and susceptible populations to harm done to them, the ethical rules governing lawyers and judges should clearly state, and be understood, as prohibiting this type of coercion.

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I. INTRODUCTION

The legend of Damocles is a familiar one.¹ While often used to express the sentiment that a tyrant is never able to live without fear,² it is more commonly used to describe scenarios involving a sense of impending doom.³ When Damocles looked up and saw the sword above him suspended by a single horse hair, he realized the precariousness of his situation and quickly sought to extricate himself from the source of danger. For many unauthorized immigrants,⁴ Damocles' sword is represented by the ever-present threat of removal.⁵ In most instances removal represents a severe adverse outcome for the unauthorized immigrant. Recognizing the power of such a threat may turn knowledge of someone's unauthorized status into a sword that is able to extract gains for the one who wields it, and it turns out that this particular sword is wielded often in a wide range of circumstances in what I refer to as "status coercion."

In 2008, a homeowner in an Atlanta suburb attempted to sell his home.⁶ After listing the home, a neighbor came forward with an offer.

1. BERGER EVANS, *DICTIONARY OF MYTHOLOGY* 66 (Dell Publishing 1991) (1970).

2. The moral behind Damocles' story was stated best by Shakespeare, "[u]neasy lies the head that wears a crown." WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE FOURTH* act 3, sc. 1, line 34.

3. See EVANS, *supra* note 1, at 66.

4. According to estimates, there are approximately twelve million unauthorized immigrants currently living in the United States. JEFFREY S. PASSEL & D'VERA COHN, *A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES*, at i (2009), <http://pewhispanic.org/files/reports/107.pdf> (explaining that as of 2008, there were approximately 11.9 million unauthorized immigrants in the United States). These individuals are frequently referred to, among many other terms, as "unauthorized immigrants," "undocumented immigrants," or "illegal aliens." For consistency and clarity, I shall refer to these individuals as "unauthorized immigrants." See, e.g., Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 29 n.7 (2008) (highlighting and outlining previous commentators' discussions on proper terminology for unauthorized immigrants).

5. The term "removal" encompasses the two formerly distinct categories of hearings for exclusion or deportation. 8 U.S.C. § 1229a (2006); see also Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1641 (2010).

6. See *Homeowner's Illegal Status Exposed After Aborted Sale*, FOXNEWS.COM, Nov. 17, 2008, <http://www.foxnews.com/story/0,2933,453011,00.html>.

At first the buyer, Ms. Griffin, requested a postponement of the closing due to problems in locking her interest rate; however, the parties agreed to a move-in arrangement where Ms. Griffin would pay rent until the sale closed.⁷ Shortly thereafter, there was a delay by the seller, Mr. Jimenez, due to a problem with title. Mr. Jimenez had listed his minor daughter as the owner of record due to her U.S. citizenship. In order to complete the home sale, a conservatorship was needed to transfer title from the daughter back to her father. In the interim, the relationship between the parties soured. Ms. Griffin claimed that Mr. Jimenez had agreed to waive three months rent due to his delay in closing, while Mr. Jimenez's attorney argued that the offer had not been a firm offer, nor was it accepted in a timely fashion. Ultimately, a judge ordered Ms. Griffin to pay retroactive rent and vacate the property.⁸

While the story above sounds like a typical souring of a deal between a buyer and seller of a home, what happened next was not so ordinary. Ms. Griffin, somehow aware that Mr. Jimenez was an unauthorized immigrant, contacted the FBI, local police, local media, the state attorney general, the governor's office, and others. The office of her Congressman, U.S. Rep. Tom Price, also contacted U.S. Immigration and Customs Enforcement ("ICE").⁹ In addition to allegedly damaging the property, Ms. Griffin also attempted to have the Georgia State Real Estate Commission revoke the license of the real estate agent involved. Thereafter, Ms. Griffin contacted Mr. Jimenez's employer regarding his unauthorized status which resulted in termination of his employment, and finally, Ms. Griffin posted bright red signs in the yard, which read: "This house is owned by an illegal alien."¹⁰ Unsurprisingly, ICE agents subsequently arrived at Mr. Jimenez's residence and placed him in removal proceedings.

Ms. Griffin, who has not attempted to buy another home because she is unable to afford one, said: "At the end, do I feel bad the family got in trouble? No, not at all."¹¹ Specifically mentioning the fact that she was the cause of Mr. Jimenez's employment termination, Ms. Griffin said: "[O]nce I realized my family had seven days to get out of a house that a family's not even legally supposed to own . . . I did let his employer know."¹² For those familiar with cratered negotiations (no

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

matter the subject of the deal), the emotions expressed are nothing new. Ms. Griffin's statement that "I don't feel bad for anything that happens to the Jimenez family at this point" is not terribly unusual, though the consequences to the Jimenez family are.

So the question arises, when, if ever, is it proper to use an unauthorized immigrant's status against him in a civil or commercial context? As cathartic as the venting process for Ms. Griffin may have been to her, this article suggests that it is almost never proper to use unauthorized status in civil proceedings and commercial negotiations because of ethical and legal constraints.¹³ Part II of this article will discuss the various fora where the described harms most often occur, analyze the impetus for the harms, and discuss the consequences, where appropriate, of the same.¹⁴ Part III of this article will look at ethical obligations, primarily those imposed by the Rules of Professional Responsibility on attorneys and the Model Code of Judicial Conduct for judges.¹⁵ Part III will also look in a more narrow perspective at potential legal prohibitions and sanctions regulating this type of behavior. Part IV will suggest potential remedies available to the unauthorized immigrant in both civil and immigration proceedings when faced with status coercion.¹⁶ Part V will conclude that current ethical and legal obligations imposed on community members should be sufficient to prevent status coercion in commercial and civil contexts in the vast majority of cases.¹⁷ In addition, states should adopt specific rules or issue ethical opinions on point to provide guidance to all attorneys and judges faced with these situations. As unauthorized immigrants are one of the most vulnerable and susceptible populations to harm done to them under color of law, the ethical rules governing lawyers and judges should clearly state, and be understood, as prohibiting this type of coercion.

II. (OVER)ZEALOUS ADVOCATES

Unauthorized immigrants are in a uniquely disadvantaged negotiating position any time their unauthorized immigration status is known by the opposing party.¹⁸ There are those who believe that such a

13. See *infra* Part III.A. & B.

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Part IV.

17. See *infra* Part V.

18. See David P. Weber, *Halting the Deportation of Businesses: A Pragmatic Paradigm for Dealing with Success*, 23 GEO. IMMIGR. L.J. 765, 783–84 (2009) (noting the untenable bargaining position of the unauthorized immigrant in commercial negotiations when

bargaining position comes part and parcel with unauthorized status.¹⁹ They believe that proper representation of clients requires exploiting the fact of unauthorized presence, even to the point of suggesting that attorneys representing unauthorized immigrants *must* disclose their clients' status to prevent their own commission of a crime.²⁰ Nor is this viewpoint limited in scope as articles,²¹ cases,²² and court transcripts²³ in a wide range of practice areas document the aggressive approach many attorneys take in pursuing an advantage based on their opponent's unauthorized immigration status.²⁴ This article posits robust ethical and

threatened with immigration-related consequences).

19. See J.J. Knauff, *A Defense Primer for Suits by Illegal Aliens*, 61 BAYLOR L. REV. 542, 577 (2009) (proposing various tactics to utilize unauthorized status to protect against damage awards, attack expert witnesses, and dismiss lawsuits on assorted grounds).

20. *Id.* The article goes so far as to suggest that counsel for the unauthorized immigrant has an ethical duty to disclose the immigrant client's unauthorized status to the court to avoid committing the crime of misprision of felony (the concealment of a felony). *Id.* at 570–71. This proposition is patently incorrect, even on the factual pattern set forth in the original article. *Id.* at 543–44; see also 18 U.S.C. § 4 (2006) (federal misprision of felony statute). The section provides:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 4. Active concealment, whether physical or verbal, is required for the elements to be established. See Christopher Mark Curenton, *The Past, Present, and Future of 18 U.S.C. § 4: An Exploration of the Federal Misprision of Felony Statute*, 55 ALA. L. REV. 183, 185–86 (2003) (explaining the dichotomy between physical and verbal concealment, and noting the heightened standard for verbal concealment to include cases such as “knowingly providing the police with completely false information”); see also *Roberts v. United States*, 445 U.S. 552, 558 n.5 (1980) (requiring some affirmative act of concealment); *United States v. Worcester*, 190 F. Supp. 548, 565–66 (D. Mass. 1960) (summarizing federal court holdings as requiring “active concealment” rather than “mere failure to disclose” for the establishment of the crime of misprision of felony). Last, not all immigration violations are felonies. For example, unlawful entry is only a federal misdemeanor. 8 U.S.C. § 1325(a).

21. See, e.g., Knauff, *supra* note 19.

22. See, e.g., *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230 (Tex. 2010).

23. See, e.g., Transcript of Hearing Record, *Montes v. Montes*, No. TD-028738 (Cal. Super. Ct. Jan. 6, 2006) (on file with author).

24. By way of anecdotal evidence, while researching this article the author sent out an e-mail to a listserv for attorneys who practice or have an interest in the immigration implications of the Violence Against Women Act (“VAWA”), and within fifteen minutes e-mails from academics and practitioners across the country began to arrive sharing their experiences involving status-based coercion, including a case where a judge, on testimony from a battering spouse, ordered a battered spouse to report herself to Immigration and Customs Enforcement (“ICE”) for removal. E-mail from Laura A. Russell, Supervising Attorney, The Legal Aid Soc’y, Bronx Neighborhood Office, to David P. Weber, Assistant Professor, Creighton Univ. Sch. of Law (May 20, 2010, 20:11 CST) (on file with author).

criminal limits on zealous advocacy and private actors that are present in cases of status coercion.

A. Negotiation Tactics in Commercial Dealings/Commercial Litigation

One area of high concern, and perhaps the most likely to be underreported, is the coercive use of unauthorized immigration status in commercial negotiations. The reason for the lack of reported cases is most likely the fact that the threats of reporting the unauthorized immigrant to ICE were successful.²⁵ Unsurprisingly, one area that is well represented in both case law and academic literature is employment and labor law.²⁶ In terms of workplace conditions, threats to report immigrants to ICE, and the inability to adequately defend oneself against a dominant party, employers have long taken advantage of unauthorized immigrants' precarious legal position.²⁷

Typical abuses include unilateral reductions in pay and denials of benefits.²⁸ In a comprehensive national study, almost half (forty-nine

25. One attorney stated that every single client of his, when confronted with a threat to report his/her unauthorized immigration status decided to forego seeking any legal remedy. E-mail from Louis Valencia II, Attorney, to David P. Weber, Assistant Professor, Creighton Univ. Sch. of Law (May 20, 2010, 14:15 CST) (on file with author). The results are often similar in the employment litigation context; though it appears that unauthorized immigrants who commence proceedings in any of the identified areas are more likely to pursue their claim to a final resolution. *See also* Russ Buettner, *For Nannies, Hope for Workplace Protection*, N.Y. TIMES, June 3, 2010, at A1 (noting that domestic workers in New York fear that a proposed law providing workplace guarantees to all workers, authorized or not, will not benefit unauthorized immigrants as they would likely be unwilling to report violations to a government agency for fear of being discovered).

26. *See infra* Part II.C.

27. The power and economic utility of possessing authorized status in the United States labor market cannot be overemphasized. After the 1986 Immigration Reform and Control Act ("IRCA"), unauthorized immigrants who were able to adjust their status to that of legal permanent resident saw their wages increase dramatically, even when controlling for factors like education, language ability, and length of residency in the United States. *See* Francisco L. Rivera-Batiz, *Undocumented Workers in the Labor Market: An Analysis of the Earnings of Legal and Illegal Mexican Immigrants in the United States*, J. POPULATION ECON. 91, 100-06 (1999) (noting that authorized immigrants earn approximately forty percent more than unauthorized immigrants, and that over fifty percent of that difference is likely due to discrimination against unauthorized immigrants).

28. A recent national study of 264 day labor sites around the country examining workplace abuse of unauthorized immigrants found widespread and systematic abuse:

Nearly half of all day laborers (49 percent) have been completely denied payment by an employer for work they completed in the two months prior to being surveyed. Similarly, 48 percent have been underpaid by employers during the same time period. The nonpayment and underpayment of wages is a particular problem in the Midwest where 66 percent of day laborers were denied their wages in the two months prior

percent) of day laborers reported being denied all wages for completed work, and nearly half reported being denied required breaks, food, and water.²⁹ Interestingly, the population surveyed did not consist entirely of unauthorized immigrants; however, it seems that it did consist of *seemingly* unauthorized immigrants which the employers assumed would not report the workplace misconduct.³⁰ In addition to day laborer hiring practices, misconduct regarding immigration status is also quite prevalent in union-forming/busting situations. Fifty percent of companies with a majority of its workforce comprised of unauthorized immigrants in union-busting situations made threats of reporting the unauthorized immigrants to ICE.³¹

While this type of employment-based discrimination against unauthorized immigrants has existed for decades, if not centuries, recent animosity towards unauthorized immigrants has begun to be expressed in almost any litigation involving an unauthorized immigrant.³² A recent California case brought by unauthorized immigrants illustrates the techniques employed by counsel.³³ In *Mendoza v. Ruesga*, the defendant, an immigration consultant,³⁴ charged six unauthorized immigrants between \$15,000 and \$16,000 each to obtain work permits and legal residence.³⁵

The defendant, Ruesga, applied for immigration relief for which the plaintiff applicants were ineligible.³⁶ Subsequently, the defendant alleged that he could utilize his “inside contacts” within the immigration

to being surveyed, and 53 percent were underpaid.

ABEL VALENZUELA JR. ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES 14 (2006), <http://www.today.ucla.edu/portal/ut/document/onthecorner.pdf>.

29. *Id.*

30. See *id.*; see also Mary Beth Sheridan, *Pay Abuses Common for Day Laborers, Study Finds*, WASH. POST, June 23, 2005, at A01 (quoting non-profit attorney Steve Smitson). Attorney Smitson stated: “What we find is, many day laborers are documented. But the employers just assume they’re undocumented. They assume they’re afraid to report the crime.” *Id.*

31. Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECON. POL’Y INST. May 20, 2009, at 12, <http://www.epi.org/publications/entry/bp235/>.

32. See generally Benny Agosto Jr. & Jason B. Ostrom, *Can the Injured Migrant Worker’s Alien Status be Introduced at Trial?*, 30 T. MARSHALL L. REV. 383 (2005) (highlighting personal injury and loss of earnings litigation where defendants attempted to use the plaintiffs’ unauthorized status to influence the outcome of the proceedings).

33. *Mendoza v. Ruesga*, 86 Cal. Rptr. 3d 610 (2008).

34. An “immigration consultant” is defined as a “person who gives nonlegal assistance or advice on an immigration matter.” CAL. BUS. & PROFESSIONS CODE § 22441 (2009). See also *Mendoza*, 86 Cal. Rptr. 3d at 619.

35. *Mendoza*, 86 Cal. Rptr. 3d at 614.

36. *Id.* at 615.

service to remove impediments to obtaining amnesty.³⁷ Notably, according to the defendant's own testimony, the plaintiffs wanted to utilize only "truthful evidence."³⁸ Regardless of that fact, the defendant provided letters falsely stating that he had known the plaintiffs since 1982, and provided letters from a farm labor contractor that falsely stated that the plaintiffs had worked for the company beginning in 1982.³⁹ The plaintiffs sued the defendant for violation of the consumer protection Immigration Consultants Act ("ICA").⁴⁰

Demonstrating a fair amount of chutzpah, defendant responded to the complaint by raising the affirmative defense of unclean hands.⁴¹ The defendant alleged, and a jury agreed, that the plaintiffs should not prevail on their claim for violation of the ICA or the breach of fiduciary duty due to their own unclean hands resulting primarily from their unauthorized status and the following of defendant's instructions on which documents to sign.⁴² The court of appeals reversed, holding "as a matter of law the unclean hands doctrine is not an affirmative defense to an ICA cause of action."⁴³ The court noted that "[t]he dishonesty of undocumented immigrants cannot be countenanced, of course, but the Legislature was undoubtedly aware of that potential when it enacted the ICA and subsequent amendments."⁴⁴

Therefore, even in a case where the unauthorized immigrants prevailed, the tactics are clear. Defendant's counsel, as in *Mendoza*, are relying on plaintiffs' unauthorized immigration to invoke both the doctrine of unclean hands and *in pari delicto*⁴⁵ — both of which necessarily involve the assumption that the unauthorized immigrants should be prohibited from seeking a judicial remedy for an apparent wrong that they have committed. Even while ruling against these arguments (which prevailed at the trial level in *Mendoza*), and stating the need to protect this class of individuals, the appellate court left us to ruminate on the "dishonesty of undocumented immigrants," which is

37. *Id.*

38. *Id.* at 616.

39. *Id.*

40. *Id.* at 615.

41. The doctrine of unclean hands essentially states that a party seeking equitable relief must not have behaved poorly. "[The party] must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim." *Id.* at 616–17.

42. *Id.* at 616.

43. *Id.* at 619.

44. *Id.*

45. The doctrine of *in pari delicto* is the principle that a plaintiff who has participated in a wrongdoing or is equally culpable may not benefit from the wrongdoing. BLACK'S LAW DICTIONARY 806–07 (8th ed. 2004).

inherent in their status.⁴⁶

While *Mendoza* was an instance in which opposing counsel was clearly involved in invoking unauthorized status, in many instances the opposing party acts unilaterally. In *United States v. Farrell*,⁴⁷ hotel operators essentially imprisoned nine Filipinos by confiscating their immigration documents, paying them approximately fifty percent of minimum wage, and wrongfully requiring payment for initial travel expenses and certain immigration filings.⁴⁸ In addition to the almost absolute control of the workers' lives, which included managing their money, restricting their ability to travel from their apartment to the hotel, and their contact with anyone in the local community, the hotel operators also attempted to utilize the threat of removal and police action by calling in the chief of police to speak with the workers. After the chief spoke with them, the hotel operators remained outside of the immigrants' apartment, not allowing them to leave, even to purchase food.⁴⁹ Interestingly in this case, the high level of criminal harassment and threat of removal was visited on *authorized* immigrants. However, the threat of removal, which in this case depended on employment from the hotel operators, allowed for exceptionally cruel status coercion.⁵⁰

While private parties acting unilaterally in such a fashion is unsavory and potentially illegal,⁵¹ similar conduct pursued by counsel seems even more objectionable. Barring a very small subset of cases where unauthorized immigration status may be relevant such as with lost wages,⁵² in most cases, one of the primary purposes for introducing the issue is likely intimidation and coercion.⁵³ In North Carolina, the only state that appears to have an ethics opinion directly on point, one attorney made two separate inquiries.⁵⁴ In the first, she asked whether it

46. *Mendoza*, 86 Cal. Rptr. 3d at 619.

47. *United States v. Farrell*, 563 F.3d 364 (8th Cir. 2009).

48. *Id.* at 367–68.

49. *Id.* at 371–72.

50. *Id.* at 372–73 (noting that because the immigrants believed themselves to be subject to physical harm and to removal, such a threat appears to have been a threat of force that could constitute illegal coercion and involuntary servitude).

51. In one contract dispute case, a trial court (subsequently reversed) barred an employer from threatening to contact immigration authorities and suggested that doing so may constitute involuntary servitude. *Vintage Health Res., Inc., v. Guiangan*, 309 S.W.3d 448, 458 (Tenn. Ct. App. 2009).

52. *See infra* Part III.B.2.

53. Transcript of Hearing Record at 14, *Montes v. Montes*, No. TD-028738 (Cal. Super. Ct. Jan. 6, 2006) (on file with author) (noting apparent “power play” by reporting immigration status in an attempt to gain custody of a child).

54. N.C. State Bar Formal Ethics Op. 15 (2009).

was permissible, in a civil lawsuit, “to threaten to report the plaintiff or a witness to immigration authorities to induce the plaintiff to capitulate during the settlement negotiations.”⁵⁵ Upon receiving a negative response, in a follow-up query four years later, the attorney asked whether it was permissible to simply report the plaintiff or a witness to immigration authorities as long as no threat was made.⁵⁶ In both cases, the North Carolina State Bar Ethics Committee held that such conduct was impermissible.⁵⁷ Two points should be made of these two inquiries: one, the attorney apparently believed the issue was a close one given the written inquiries, and two, no other state has adopted similar opinions that would provide guidance to counsel regarding any ethical constraints. In fact, given the prevalence of judicial opinions and anecdotal evidence in which coercive negotiation or litigation tactics arise, it would appear that many attorneys believe status coercion is acceptable advocacy.

In regard to civil litigation and employer–employee litigation, which is discussed much more in depth below, the Supreme Court of Washington recently decided *Salas v. Hi-Tech Erectors*.⁵⁸ In *Salas*, the Washington Supreme Court reversed both the trial court and court of appeals who had allowed evidence regarding Mr. Salas’s immigration status in a negligence action.⁵⁹ The employer’s argument as to relevancy was that the plaintiff’s future income could be affected by his immigration status and potential removal, and therefore was properly before the jury.⁶⁰ While the argument may have had some merit in the abstract, the plaintiff had resided in the United States since 1989, owned a home, and had three children while residing here.⁶¹ Therefore, while the immigration issue was relevant for Rule 401 purposes,⁶² the court held that its probative value was substantially outweighed by its prejudicial effect.⁶³

Similar to *Salas*, in *Wal-Mart Stores, Inc. v. Cordova*,⁶⁴ the plaintiff

55. N.C. State Bar Formal Ethics Op. 3 (2005).

56. N.C. State Bar Formal Ethics Op. 15 (2009).

57. N.C. State Bar Formal Ethics Op. 15 (2009); N.C. State Bar Formal Ethics Op. 3 (2005).

58. *Salas v. Hi-Tech Erectors*, 230 P.3d 583 (Wash. 2010). Mr. Salas was injured when he slipped and fell twenty feet from his employer’s ladder which did not meet code requirements. *Id.* at 584.

59. *Id.*

60. *Id.* at 584–85.

61. *Id.* at 585.

62. FED. R. EVID. 401.

63. *Salas*, 230 P.3d at 587 (reversing the trial court on an “abuse of discretion” standard).

64. *Wal-Mart Stores, Inc. v. Cordova*, 856 S.W.2d 768 (Tex. Ct. App. 1993).

brought a tort claim against Wal-Mart for injuries sustained while shopping. Wal-Mart attempted to reduce damages based on earnings capacity given the plaintiff's tenuous residency in the United States.⁶⁵ The court categorically rejected Wal-Mart's theory.⁶⁶ Although pre-*Hoffman*,⁶⁷ *Cordova's* holding that immigration status is irrelevant to lost earning capacity⁶⁸ was subsequently affirmed ten years later as the court held that any immigration policy that weighed against awarding backpay was not applicable to common law tort damages.⁶⁹

B. Custody Proceedings / Divorce Settlement

One area in which the literature regarding use of immigration status is more developed is in custody proceedings.⁷⁰ The typical case involves mixed-status families⁷¹—where the immigration status of one parent is different from the other parent.⁷² Mixed status does not necessarily indicate that one parent is an unauthorized immigrant, though that situation is not uncommon when the parent with authorized immigration status tries to take advantage of the other's immigration vulnerability.⁷³

In addition to parties and their attorneys using immigration status

65. *Id.* at 770 n.1.

66. *Id.* ("Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for loss of earning capacity, nor will this Court espouse such a theory.")

67. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (prohibiting unauthorized immigrants from receiving backpay as such an award would be contrary to the policies espoused in the Immigration Reform and Control Act of 1986).

68. *Cordova*, 856 S.W.2d at 768. Lost earnings capacity must be distinguished from lost wages. Lost earnings capacity is recovery for the loss of capacity to earn money prospectively. *Id.* at 770. Lost wages or backpay are generally defined as wages not earned due to wrongful termination or injury. *Hoffman Plastic*, 535 U.S. at 142, 149.

69. *Tyson Foods, Inc. v. Guzman*, 116 S.W. 3d 233, 244 (Tex. Ct. App. 2003).

70. Professor David B. Thronson has written extensively in this area. See, e.g., David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165 (2006); David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453 (2007); David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45 (2005) [hereinafter Thronson, *Of Borders and Best Interests*].

71. See Thronson, *Of Borders and Best Interests*, *supra* note 70, at 49, 52 (noting that of noncitizen-headed families with children, eighty-five percent are mixed status).

72. MiaLisa McFarland & Evon M. Spangler, *A Parent's Undocumented Immigration Status Should Not be Considered Under the Best Interest of the Child Standard*, 35 WM. MITCHELL L. REV. 247, 259 (2008) (noting the complications of mixed families of multiple immigrants where some family members may be able to legalize their status while others are not).

73. See Thronson, *Of Borders and Best Interests*, *supra* note 70, at 56.

coercively, judges themselves have engaged in such behavior. Statements such as “I have a problem with your immigration situation” are not uncommon.⁷⁴ Given the best interests legal framework involved in custody proceedings,⁷⁵ courts have wide latitude in considering relevant factors. In *Rodriguez v. Rico*,⁷⁶ a judge, relying on the legal permanent resident father’s erroneous argument that the children could only obtain authorized status in the father’s custody, awarded custody of two unauthorized immigrant children to the legal permanent resident father even though the children had not had any contact with the father for the preceding seven years.

Rodriguez is just illustrative. The number of custody cases where immigration status is the sole or primary determinative factor is impressive. If the parties or counsel are committed to bringing immigration status into the proceedings, but do not wish to be seen as clearly attempting to seek advantage based on that status, there are other ways to obliquely bring immigration status into the proceedings. One way is through the issue of employment (or lack thereof). Either the parent is unemployed (a negative factor in the best interest analysis),⁷⁷ or the parent is employed, and as a result of immigration status is therefore in violation of the law (also a potential negative factor).⁷⁸ In an Idaho case, the authorized immigrant father brought up the issue as one of driving privilege in that the unauthorized immigrant mother and her family were unable to obtain valid drivers’ licenses.⁷⁹ This Idaho Custody Case is particularly jarring as the authorized

74. See *id.* at 54 (citing *In re M.M.*, 587 S.E.2d 825, 831 (Ga. Ct. App. 2003)).

75. See, e.g., *In re Pryor*, 320 N.E.2d 973, 976 (Ohio Ct. App. 1993) (stating that the primary consideration courts employ when determining custody cases is the best interest and welfare of the child standard). The courts base their review of this standard by examining the totality of the circumstances which includes a number of factors specified by statute. OHIO REV. CODE ANN. § 3109.04(F)(1) (LexisNexis 2008 & Supp. 2010). The factors include: the wishes of the parents and the child; the child’s relationship with parents, siblings, and others involved in the child’s life; the child’s ability to adjust; the mental and physical health of the child, parents, and others involved; the parent more likely to obey court orders and decisions; compliance with child support payments; and the criminal history of the parents. *Id.*

76. 120 P.3d 812, 816–17 (Nev. 2005) (holding that district court has the discretion to consider a parent’s immigration status in custody hearings, and noting further that district court’s reliance on erroneous immigration advice was harmless error).

77. *In re Duenas*, No. 05-1751, 2006 WL 3314553, at *8 (Iowa Ct. App. Nov. 16, 2006) (granting custody to the father, a legal permanent resident because the mother, an unauthorized immigrant, did not have a job or driver’s license). The district court in *Duenas* noted that the mother’s unauthorized immigration status “complicate[d] the custody issue.” *Id.* at *3.

78. See McFarland & Spangler, *supra* note 72, at 259.

79. All identifying information, such as party names, case number, and date, has been redacted from this case. A redacted copy of the case is on file with the author.

immigrant father repeatedly physically and sexually abused his former wife (who was between fifteen and sixteen years old at the time).⁸⁰ Incredibly, after finding the father to be a “habitual perpetrator of domestic violence,” the court awarded joint legal custody to the father on the grounds that the mother and her parents are not licensed to drive, may someday be subject to removal, and that “it is in the best interests of the minor children to have a parent or guardian, (who has legal custody of these children), to also have legal status as a lawful resident in this country.”⁸¹

Of course not all courts are receptive to arguments based on status.⁸² In *Montes*, the court “question[ed] the wisdom of having a child with a woman from another country and then when the marriage falls apart, attempting to use that to apparently automatically obtain custody of a child.”⁸³ The court further noted the authorized parent’s “exaggerated sense of entitl[ment]” which “expressed itself in taking positions with the government that can’t possibly benefit the child. That appears to be in effect a power play.”⁸⁴ In conclusion, the court strongly stated to the father: “As far as I can tell, in order to attempt to gain advantage in this custody dispute, you really have created a terrible situation for the entire family.”⁸⁵

Even more worrisome than the coercive use of immigration status in ordinary custody decisions is coercive use by an abusive spouse.⁸⁶ Congress itself expressed concern when passing the Violence Against Women Act (VAWA), noting that domestic violence is “‘terribly exacerbated in marriages where one spouse is not a citizen and the non-citizen’s legal status depends on his or her marriage to the abuser.’”⁸⁷ Courts that make custody determinations based primarily or solely on immigration status may be enabling the abusers to make good on their threats.⁸⁸

80. The level of abuse is shocking and includes, among other things, forced intercourse at the hospital while the unauthorized immigrant mother was being hospitalized for medical complications with her pregnancy. Eventually the forced social contact caused the mother to enter into premature labor. See case cited *supra* note 79, at 2–3.

81. See case cited *supra* note 79, at 8–9.

82. See, e.g., Transcript of Hearing Record, *Montes v. Montes*, No. TD-028738 (Cal. Super. Ct. Jan. 6, 2006) (on file with author).

83. *Id.* at 8.

84. *Id.* at 14.

85. *Id.* at 49.

86. See, e.g., Gail Pendleton, *Ensuring Fairness and Justice for Noncitizen Survivors of Domestic Violence*, JUV. & FAM. CT. J., Fall 2003, at 69, 69.

87. *Id.* (quoting H.R. Rep. No. 103-395, at 26–27 (1993)).

88. See *id.* at 71 (noting that the abusers often are the initial parties to contact ICE, and

Given the protective nature and purpose of the VAWA statute, it is not surprising that applicants may file petitions without notice to the alleged abuser, and further, that such petitions are to be treated confidentially.⁸⁹ The Department of Homeland Security has imposed guidelines and has even sought a broader application of coverage than the language of the statute would imply on its face.⁹⁰

In the divorce setting, judges have had very mixed results. In one case, a judge prevented a divorce from occurring given the adverse immigration consequences foreseen for the immigrant spouse or child.⁹¹ However, in other cases unauthorized immigrants have been able to avoid orders of child support on the grounds that they lacked work authorization.⁹² In an especially egregious case of duplicity (on both sides), a judge was very critical of the husband who had obtained legal immigrant status for himself and his daughter, but had failed to do so for his wife, whom he had also subjected to domestic violence.⁹³ In other cases, judges have not been immune to bias even when no custody issue is present.⁹⁴

In *Lee v. Kim*, the immigrant wife alleged she was a victim of domestic abuse, but rather than focusing on the abuse, the judge focused on potential immigration benefits that the wife may have been eligible for as a victim of domestic violence.⁹⁵ Even though the wife was

that oftentimes the abusers then claim that the marriage was fraudulent).

89. See Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1953 (1994); see also Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). The confidentiality of VAWA petitions is codified at 8 U.S.C. § 1367 (2006).

90. See Memorandum from John P. Torres, Director, Office of Detention and Removal Operations, and Marcy M. Forma, Director, Office of Investigations, to Field Office Directors and Special Agents in Charge (Jan. 22, 2007), <http://www.aila.org/content/default.aspx?bc=10161671518412124578121720> (establishing confidentiality protocol for treatment of aliens who qualify or may qualify for relief under VAWA benefits or T or U nonimmigrant visas); see also *United States v. Hawke*, No. C-07-03456, 2008 WL 4460241, at *6 (N.D. Cal. Sept. 29, 2008) (holding that 8 U.S.C. § 1367(a) should be read as stating “denied on the merits” rather than simply “denied,” and thereby denying the alleged abuser’s request to obtain a copy of the VAWA application).

91. See Thronson, *Of Borders and Best Interests*, *supra* note 70, at 60–61 (citing *Velez v. Velez*, No. 10 14 81, 1994 Conn. Super. LEXIS 3139, at *5–13 (Conn. Super. Ct. Dec. 7, 1994)).

92. See *id.* at 70 (citing *Ali v. Tiwana*, No. FA030473530S, 2003 Conn. Super. LEXIS 2535, at *7 (Conn. Super. Ct. Sept. 5, 2003)).

93. *Rocano v. Rocano*, No. 20726/02, 2006 WL 1594480, at *14 (N.Y. Sup. Ct. Apr. 12, 2006).

94. Transcript of Proceedings at 13–14, *Lee v. Kim*, No. F0105876 (Ca. Sup. Ct. Oct. 23, 2009) (on file with author).

95. *Id.* (“If she’s found to be a victim of domestic violence, then she can file to remain in the country under [VAWA]. It’s the only way at this point; is that right?”)

previously referred to a domestic violence restraining order clinic and a mental health worker, the judge refrained from asking any questions as to the allegations of physical and sexual abuse.⁹⁶ It is almost certain that had the wife appeared before the judge in a motion for a restraining order that did not have immigration implications, a line of questioning into the alleged abuse would have been the focus of the hearing.⁹⁷

C. *Employment Litigation*

Employment is perhaps the one area in which immigration status should be considered relevant depending on the type of relief sought;⁹⁸ and given the predictable tension between employers and employees in any lawsuit between them, it is not surprising that immigration status has often surfaced in civil suits ranging from wrongful firing, to labor organizing, to workmen's compensation and torts resulting from workplace injury.⁹⁹ In employment litigation suits, as in custody or divorce proceedings, given the relationship between them, the parties are likely to have very good levels of knowledge regarding the immigration status of the individuals involved.¹⁰⁰ Given that knowledge, it is unsurprising that unscrupulous employers would try to take advantage of the tenuous position of the immigrant.

In one nation-wide survey, twenty-five percent of workers whose employers had received a no-match letter¹⁰¹ from the Social Security Administration about them were not fired until they complained about

96. See Brief of Appellant at 6, 15, *Lee v. Kim*, No. A127393 (Cal. Ct. App. May 3, 2010).

97. At times, the bias is race specific even if the individual is legally present in the United States. In a Nebraska court in 2003, a judge ordered that a Mexican-American father was prohibited from speaking "the Hispanic language" to his daughter if he did not wish to have his "visitation rights . . . severely limited." Darryl Fears, *Judge Orders Neb. Father to Not Speak 'Hispanic,'* WASH. POST, Oct. 17, 2003, at A3. While the father did not suffer from status coercion in his case, it appears that his ancestry was used against him negatively in the custody proceeding.

98. See *In re Tuv Taam Corp.*, 340 N.L.R.B. 756, 761 (2003) (suggesting that unauthorized immigrant status may be relevant in an unlawful failure to hire claim if the matter is defending on the basis of the individual's immigration status).

99. See, e.g., *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002) (holding that unauthorized immigrants are not entitled to receive an award of backpay, as such an award would be contrary to the policies espoused in the Immigration Reform and Control Act of 1986).

100. See *infra* notes 109–113 and accompanying text.

101. A no-match letter is a letter sent by the Social Security Administration ("SSA") to an employer when an employer-submitted W-2 differs from the SSA's database regarding an employee's social security number. See *Aramark Facility Serv. v. Serv. Employees Intern. Union, Local 1877, AFL CIO*, 530 F.3d 817, 826 (9th Cir. 2008).

worksite conditions.¹⁰² An additional twenty-one percent whose employers had received no-match letters reported that no action was taken until they began union or organizing activities.¹⁰³ In the National Labor Relations Board case *In re Tuv Taam Corp.*, the employer attempted to justify its unfair labor practices related to labor organizing on the grounds that the individuals it fired were allegedly unauthorized.¹⁰⁴ Others reported that either their employers discharged them from their position and rehired them from temp agencies at lower wages and without benefits, or that they did not fire them, but rather continued their employment while reducing wages or benefits.¹⁰⁵

The one area of consensus where courts have held immigration status to be relevant has concerned the remedy of backpay for wrongful termination.¹⁰⁶ In 2002, the U.S. Supreme Court decided *Hoffman Plastic Compounds, Inc. v NLRB*, holding (against the argument of the NLRB), that unauthorized immigrants are prohibited from receiving an award of backpay for work not rendered even if they have been discharged in violation of the National Labor Relations Act (NLRA).¹⁰⁷ With the passage of IRCA in 1986, Congress explicitly made it a separate criminal offense for companies to knowingly employ unauthorized immigrants. Given that congressional signpost, the Court held that the policy against unlawful employment therefore trumped the NLRA's policy against deterring discriminatory conduct by an employer

102. CHIRAG MEHTA ET AL., SOCIAL SECURITY ADMINISTRATION'S NO-MATCH LETTER PROGRAM: IMPLICATIONS FOR IMMIGRATION ENFORCEMENT AND WORKERS' RIGHTS 16 (2003), http://www.nilc.org/immsemplymnt/SSA_no-match_survey_final_report_11-20-03.pdf.

103. *Id.*

104. *In re Tuv Taam Corp.*, 340 N.L.R.B. 756, 756 (2003). *Tuv Taam* was one of the first post-*Hoffman* cases to discuss backpay and reinstatement for cases involving unauthorized immigrants. *Id.* at 760. In its ruling, the Board held that the allegations of unauthorized status, and therefore the applicability of the remedies of reinstatement and backpay, were issues to be decided at the compliance phase of the proceedings. *Id.* The *Tuv Taam* Board noted that "[t]ypically, an individual's immigration status is irrelevant to a respondent's unfair labor practice liability under the Act." *Id.*

105. Mehta, *supra* note 102, at 18, 23 (identifying situations in which employers have reduced unauthorized immigrants' wages, sometimes by as much as fifty percent after receiving no-match letters).

106. See, e.g., *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 148–49 (2002) (holding that unauthorized immigrants are not entitled to receive an award of backpay, as such an award would be contrary to the policies espoused in the Immigration Reform and Control Act of 1986).

107. Under *Hoffman* and its progeny, unauthorized immigrants are still entitled to receive compensation for work actually performed. See *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1277 (N.D. Okla. 2006); *Galaviz-Zamora v. Brady Farms, Inc.* 230 F.R.D. 499, 501–03 (W.D. Mich. 2005).

at least as far as it constrains the NLRB in remedies that it could elect to award the wrongfully terminated employee.¹⁰⁸

Interestingly, it appears that both federal and state courts have since limited *Hoffman*'s scope.¹⁰⁹ In 2004, the Ninth Circuit Court of Appeals held that *Hoffman* does not apply to Title VII discrimination claims.¹¹⁰ In *Rivera*, the Ninth Circuit noted that, in contrast to the NLRA, Title VII requires private enforcement, the policies behind Title VII are to strongly punish and deter violators, and Title VII is interpreted by courts rather than an administrative body.¹¹¹ Primarily because of these differences as well as the great weight of authority on its side, the court concluded, "In sum, the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases."¹¹² Other courts have similarly concluded that *Hoffman* does not apply to Fair Labor Standards Act claims or workers compensation claims.¹¹³

108. *Hoffman*, 535 U.S. at 149. This ruling prohibited the NLRB from awarding backpay for work not performed, as the unauthorized employees could not be said to be "unavailable for work," or reinstatement of employment. *Id.* at 158. The Court noted that its ruling did not prevent the NLRB from imposing other sanctions such as cease and desist orders and posting notices of its past violations. *Id.* at 152. Insofar as the wrongfully terminated immigrant, however, such sanctions provide little to no benefit.

109. See, e.g., *Flores v. Albertson, Inc.*, No. CV 01-00515 AHM, 2002 U.S. Dist. LEXIS 6171, at *17-18 (C.D. Cal. April 9, 2002) (stating that *Hoffman* is inapplicable to a Fair Labor Standards Act case); *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 830 (Md. Ct. App. 2005) (holding that Maryland's workers compensation law applies to all employees regardless of immigration status); *Cano v. Mallory Mgmt.*, 760 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 2003) (noting that "every case citing *Hoffman* since it was rendered has either distinguished itself from it or has limited it greatly").

110. *Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1066-67 (9th Cir. 2004) (rejecting defendant's argument that *Hoffman* precludes the award of backpay to an unauthorized immigrant regardless of the federal statute at issue).

111. *Id.* at 1067-68. *Contra Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 188 (4th Cir. 1998) (holding that an employee was not entitled to Title VII remedies barring a showing of employment authorization). *Egbuna* has been distinguished on various grounds in the Fourth, Fifth and D.C. Circuits. See *Olvera-Morales v. Int'l Labor Mgmt. Corp.*, No. 1:05CV00559, 2008 U.S. Dist. LEXIS 3502, at *31-33 (M.D.N.C. Jan. 1, 2008); *Zirintusa v. Whitaker*, No. 05-1738, 2007 U.S. Dist. LEXIS 29, at *15-16 (D.D.C. Jan. 3, 2007); *Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003).

112. *Rivera*, 364 F.3d at 1069.

113. See, e.g., *Flores v. Amigon*, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002) (holding that *Hoffman* does not bar backpay under the FLSA); *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002) (doubting whether *Hoffman* applies to FLSA case and citing to similar cases concluding that it does not); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (Minn. 2003) (holding that IRCA did not preclude an illegal alien from receiving temporary total disability payments); *Cherokee Indus., Inc. v. Alvarez*, 84 P.3d 798 (Okla. Civ. App. 2003) (holding that unauthorized immigrant could receive workers compensation benefits).

While one attorney has published a playbook for introducing evidence of immigration status in insurance defense cases,¹¹⁴ it appears from a careful review of current case law that immigration status is generally only relevant in two situations, one in which the immigrant seeks backpay for wrongful termination which would be governed by *Hoffman*, and the other in a defense against an unlawful failure to hire case when the defense is based on immigration status. Furthermore, contrary to the playbook author's contention that counsel representing the unauthorized immigrant may themselves face criminal charges and disciplinary charges for failing to affirmatively notify the court and opposing counsel of their client's immigration status,¹¹⁵ it appears that the suggested conduct would in fact clearly violate the immigrant's attorney's ethical obligations to his or her client.¹¹⁶

D. Debt Collection

Another area where unauthorized immigrants are susceptible to coercion based on immigrant status is debt collection.¹¹⁷ New York City, which has one of the most robust consumer protection laws in the country, explicitly prohibits debt collection agencies from threatening to report the debtor to immigration authorities.¹¹⁸ Federal law is not as clear, though it also appears that such threats would run afoul of the Fair Debt Collection Practices Act (FDCPA).¹¹⁹ In addition to the

114. See Knauff, *supra* note 19 at 545–46 (dismissing holdings in three recent Texas cases distinguishing *Hoffman* as “obiter dictum and not controlling”).

115. *Id.* at 570–71 (suggesting that failure to proactively disclose the client's immigration status may constitute misprision of felony (affirmatively concealing a felony offense of another)). See *supra* note 20 and accompanying text detailing why representation of an unauthorized immigrant does not constitute misprision of felony, and further explaining that not all immigration violations are even felonies.

116. See Christine M. Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 STAN. L. REV. 355, 402–04 (2008) (identifying the tension between attorney-client confidentiality and required mandatory disclosures imposed on attorneys).

117. See Robert Gearty, *Debt Collectors 'Would Call 3 or 4 Times a Day,' Victim Says*, N.Y. Daily News, July 19, 2009, available at http://www.nydailynews.com/money/2009/07/20/2009-07-20_debt_cowboys_would_call_3_or_4_times_a_day_victim_says.html (reporting on collection agents who threatened to “send immigration to the house”).

118. See Press Release, Office of the Mayor, N.Y. City, Mayor Bloomberg and Consumer Affairs Comm'r Mintz Announce New Debt Collection Regulations to Protect New Yorkers from Being Harassed for Debts They Do Not Owe (May 17, 2010), available at http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2010a%2Fpr211-10.html&cc=unused1978&rc=1194&ndi=1.

119. Fair Debt Collection Practices Act § 806, 15 U.S.C. § 1692d (2006) (prohibiting debt collectors from engaging “in any conduct the natural consequence of which is to harass,

general prohibition on harassing conduct, the FDCPA also prohibits threats implying that nonpayment would result in the arrest or imprisonment of the immigrant if the debt collector or creditor does not intend to take such action.¹²⁰ Notably, under both New York City law, which provides a much clearer prescription against the use of immigration status, and federal law, the penalties are less than severe.¹²¹

E. State Action and Crime Reporting

Although this paper deals primarily with civil proceedings and settings, at times the government is involved as a quasi-private actor. Like their private counterparts, these state actors are not immune from engaging in status coercion. In *Doe v. Miller*,¹²² the directors of the Illinois Department of Public Aid (IDPA) and the Illinois Food Stamp Program¹²³ attempted to require all members of a household to provide verification of immigration status prior to approving the application for food stamps.¹²⁴ Where the department ascertained the immigrant to be unauthorized, the caseworkers were required to report to the former Immigration and Naturalization Service (INS), even though the child-applicants were U.S. citizens who were eligible for the aid sought.¹²⁵ On

oppress, or abuse any person in connection with the collection of a debt”).

120. *Id.* at § 1692e(4).

121. Under the FDCPA, the injured party can collect any actual damages, and up to \$1,000 of additional damages if the court allows. *Id.* at § 1692k(a)(1), (2)(A). Under New York City law, violators of the unfair collection ordinance could be liable for not less than seven hundred dollars and not more than one thousand dollars per instance. N.Y. CITY ADMIN. CODE § 20-494 (2010). In either case, the sanctions imposed likely pale in comparison to the harm suffered by the immigrant from any resulting removal action.

122. 573 F. Supp. 461 (N.D. Ill. 1983).

123. This case was decided prior to the 1996 enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which made almost all unauthorized immigrants and nonimmigrants ineligible for almost all public assistance and federal benefits, including health and disability benefits, food assistance, housing, and other similar benefits provided by the federal government. Pub.L. 104-193, §§ 400–04, 110 Stat. 2105, 2260–67 (1996). However, the minor petitioners in *Miller* would still be eligible for federal benefits today as U.S. citizens. *Id.* at §§ 401, 431.

124. IDPA’s insistence on receiving the relevant immigration status of all household members stems from their misplaced reliance on 7 U.S.C. § 2020(e)(17) (1982). The statute required the relevant state entity to “determin[e] . . . that any member of a household is ineligible to receive food stamps because that member is present in the United States in violation of the Immigration and Nationality Act.” The statute’s legislative history, which was noted by the court, was directed at determining which unauthorized immigrants were improperly attempting to obtain food stamps *on their own behalf*. House Comm. on Agriculture, Food Stamp Amendments of 1980, H.R. Rep. No. 96-788, at 414. Additionally, the legislative history specifically provided that state agencies were not to interpret the law as requiring them to act as “outreach officers of INS.” *Id.* at 135–37.

125. *Miller*, 573 F. Supp. at 463.

the basis of this policy, the IDPA succeeded in pressuring numerous eligible applicants into withdrawing their application for food stamps to avoid being reported to the INS.¹²⁶ While IDPA was ultimately unsuccessful in their attempts to collect and report immigration status, the action is a succinct example of coercive state acts against unauthorized immigrants.

Another setting in which the state may play a substantial role is the decision to seek to terminate parental rights. In some cases, the state has argued that citizen adoptive parents were “better” and the United States was a “better” place to live regardless of the standard presumption that would seek a reunion between parent and child.¹²⁷ In seeking to terminate a parent’s rights, a caseworker in a Nebraska case testified that the mother, having been removed to Guatemala, failed to comply with a case plan established by the department.¹²⁸ The caseworker testified to this point even though she had been unable to monitor the mother’s progress due to her location in a foreign country, and additionally, at no time did the caseworker provide a translated copy of the case plan when her general practice was to do so.¹²⁹ The trial court ultimately terminated the immigrant’s parental rights noting “[b]eing in the status of an undocumented immigrant is, no doubt, fraught with peril and this would appear to be an example of that fact,”¹³⁰ appearing to imply at least, that having parental rights terminated is simply one potential side-effect of being in the United States without authorization.

In Arizona, recently passed SB 1070 could have allowed for police officials who work in the local schools to question students about their immigration status in the event they have “reasonable suspicion” that a

126. *Id.* at 464–65 (detailing six different families in which the unauthorized parents applied for food stamps on behalf of the citizen children and where all six families eventually withdrew their applications due to the threat of being reported to the INS if they continued to pursue food stamps for their children).

127. *See, e.g., In re Angelica L. v. Maria L.*, 767 N.W.2d 74 (Neb. 2009). In that case, the physician treating the premature baby of the immigrant told her that if she did not follow the physician’s instructions, the physician would report her to immigration. *Id.* at 81. The immigrant was investigated by the Department of Health and Human Services (DHHS), “[b]ut after investigation, all reports were deemed unfounded.” *Id.*

128. *Id.* at 83–84.

129. *Id.*

130. *Id.* at 88. On appeal the Nebraska Supreme Court overturned the ruling, noting that the “juvenile court seemingly ignored the overwhelming evidence provided in the home studies,” but focused on the state’s argument that “living in Guatemala would put them at a disadvantage compared to living in the United States.” *Id.* at 93–94. The court concluded “[the mother] did not forfeit her parental rights because she was deported.” *Id.* at 94.

student is unauthorized.¹³¹ This type of provision could contradict the essential holding in *Plyler v. Doe* that states must give unauthorized immigrants access to public schools,¹³² and which has resulted in a policy of no immigration enforcement in school areas.¹³³ Allowing officers located on school grounds to question students, even students who have been subjected to abuse or bullying by their classmates, as to their immigration status may likely act as a coercive threat that could see many children pulled from school entirely.¹³⁴

In 2004, California Congressman Rohrabacher proposed a bill that would have required emergency room personnel to have notified immigration authorities if any patients were unauthorized immigrants.¹³⁵ The law, which would have required the hospital to turn over the immigrants after treatment, appears to technically satisfy the Emergency Medical Treatment and Active Labor Act of 1986 which prohibits hospitals from refusing to treat patients in emergency situations, regardless of immigration status.¹³⁶ In addition to the general notification language, the bill would have required emergency room personnel to fingerprint or photograph any unauthorized immigrant and report the individual to the Department of Homeland Security for

131. 2010 Ariz. Sess. Laws ch. 113; *see also* Alan Gomez, *Schools Unsure of New Arizona Immigration Law*, USA TODAY, June 14, 2010, available at http://www.usatoday.com/news/nation/2010-06-14-immigration_N.htm. School officials and law enforcement were both unsure of how to proceed under the newly passed law, as the Arizona Peace Officer Standards and Training Board, tasked with developing training for handling the new law had said that it would *not* provide training regarding the role of officers located on school grounds as such “unique situations . . . [are] too problematic and the issues too specific (to be) included in a statewide training program.” *Id.* Arizona subsequently passed an amendment to S.B. 1070 limiting law enforcement officers’ ability to question immigration status to only when an officer is making a “lawful stop, detention or arrest.” 2010 Ariz. Sess. Laws ch. 113.

132. *See Plyler v. Doe*, 457 U.S. 202, 230 (1982).

133. *See* Mary Ann Zehr, *Arizona Immigration Law Creates Uncertain Role for School Police*, EDUCATION WEEK, June 14, 2010, available at http://www.edweek.org/ew/articles/2010/06/16/35arizona_ep.h29.html?tkn=TQXF%2BD6Aa4p5eSqsIA%2F5uf9g0agwnL5h0l6&cmp=clp-edweek (noting that many have interpreted *Plyler* as prohibiting schools from engaging in any activity that may have a “chilling effect” on an individual’s right to education).

134. *See* Gomez, *supra* note 131 (noting school officials’ attempts to calm and reassure the local community that the school would not be conducting random immigration status checks as a result of the passage of S.B. 1070).

135. *See* Erin Walsh, *Bill Would Force Hospitals to Report Illegal Immigrants*, N. COUNTRY TIMES, Dec. 17, 2003, available at http://www.nctimes.com/news/local/article_a313fb0a-8e24-5680-88de-aa9adaeffa84.html. The bill was ultimately defeated 331-88. *See* Undocumented Alien Emergency Medical Assistance Amendments of 2004, H.R. 3722, 108th Cong. (2004).

136. 42 U.S.C. § 1395dd (2006).

removal.¹³⁷

Although admittedly not in a private or quasi-private setting, another disturbing way in which the state could use immigration status ill-advisedly is with victims who report crime. Stories abound of unauthorized immigrants reporting crimes, only to find themselves being questioned as to status, detained, and ultimately placed in removal.¹³⁸ Stories of police and immigration officials requesting bribes from the immigrants if they wish to avoid being placed in removal are not difficult to locate.¹³⁹ While immigrants are vulnerable in civil proceedings to status coercion, criminal and immigration proceedings generally present even more dire circumstances. The message to immigrants in these cases is clear, report crime at your own risk,¹⁴⁰ and this message is not new.¹⁴¹ What is also clear is that the unauthorized immigrant community is especially susceptible to victimization,¹⁴² that coercion based on immigration status is not limited to the civil sector, and that safeguards are needed.¹⁴³

137. See H.R. 3722, 108th Cong. (2004).

138. See, e.g., Alex Johnson & Glenn Counts, *Crime-stopper Now Faces Deportation*, MSNBC.COM, May 26, 2010, http://today.msnbc.msn.com/id/37263917/ns/us_news-immigration_a_nation_divided/. In the cited news story, the immigrant reported a police officer who had attempted to inappropriately touch his girlfriend. The officer then wrongfully arrested the immigrant for resisting arrest. *Id.* Eventually, five additional women came forward with separate allegations and the officer was fired and faces eleven counts of sexual assault, extortion, and interfering with emergency communications. *Id.* The immigrant was placed in removal proceedings, although he recently received a six-month stay on removal. *Id.*

139. See Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1452 (2006) (identifying government officials who have been caught threatening removal if the immigrants do not pay the bribes demanded); see also Nina Bernstein, *Immigration Officer Pleads Guilty to Coercing Sex From a Green Card Applicant*, N.Y. TIMES, Apr. 15, 2010, at A22 (reporting on the conviction of an immigration official for threatening an immigrant with adverse immigration consequences in exchange for sexual favors).

140. Kittrie, *supra* note 139, at 1452.

141. *Id.* at 1454 (quoting New York City Mayor Michael Bloomberg). Mayor Bloomberg stated, “[W]e all suffer when an immigrant is afraid to tell the police . . . [P]olice cannot stop a criminal when they are not aware of his crimes, which leaves him free to do it again to anyone he chooses.” *Id.*

142. One news outlet reported a Las Vegas Police community outreach program where the officer suggested a hypothetical to the immigrants, that the officer, knowing of their unauthorized presence, demanded \$200 per week for his silence. *Id.* at 1481 (citing Juliet V. Casey, *Police Pilot Program: HART Discourages Silence*, LAS VEGAS REV. J., Sept. 30, 2001, available at http://www.reviewjournal.com/lvrj_home/2001/Sep-30-Sun-2001/news/17086070.html). When asked their response, half of the immigrants admitted they would pay the fee, and not one would have reported the act. *Id.*

143. Some cities and localities have attempted so-called “sanctuary” policies designed to protect immigrants in general. See, e.g., TAKOMA PARK, MD. MUN. CODE ch. 9.04 (2004).

Therefore, in addition to the status coercion that goes on in virtually every type of civil disagreement in which immigration status is a lever to gain advantage, states and the federal government have also engaged in status coercion, sometimes in ways more subtle than others, to deter or inhibit victims from reporting crimes, to prevent eligible individuals from receiving benefits, and to deter emergency medical care among others. In order to carry out these actions, individuals need to be involved, and therefore, there should be some accountability at the individual level depending on the role of the actor involved. In the case of attorneys, the ethical guidelines in the Rules of Professional Conduct should provide a floor of ethical behavior, not a ceiling.¹⁴⁴

III. CONSTRAINTS ON IMMIGRATION STATUS THREATS

A. Criminal Law Constraints

When an immigrant is being threatened with a loss of property or something else of value, the threatening party, whether a lawyer or nonlawyer, may be engaging in the crime of extortion depending on the relevant state's definition of the crime. Extortion is generally defined as the dispossession of the property of another through threat.¹⁴⁵ The New York Penal Code defines extortion as obtaining property of another by compelling or inducing the person to deliver such property to another by threatening that upon failure to deliver the property, the actor or another will:

(iv) [a]ccuse some person of a crime or cause criminal charges to be instituted against him; or (v) [e]xpose a secret or publicize an asserted fact, whether true or false,

Other cities have passed such laws that specifically include those who report criminal activity. See, e.g., Office of the Mayor, City of N.Y., *City-Wide Privacy Policy and Amendment of Executive Order No. 34 Relating to City Policy Concerning Immigrant Access to City Services*, Exec. Order No. 41 (2003). Generally, however, these measures have been strongly disfavored by the executive branch. See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1383–85 (2006) (noting federal government's response to the sanctuary movement by prosecuting certain individuals and passing the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)). Professor Kittrie has also proposed an amendment, which would essentially require any prosecutor who learned of an immigrant's unauthorized status as a result of that immigrant reporting a crime, to obtain an independent source of knowledge of that immigrant's status prior to removal. See Kittrie, *supra* note 139, at 1503.

144. See Margaret Raymond, *The Professionalization of Ethics*, 33 FORDHAM URB. L.J. 153, 169 (2005).

145. See WAYNE R. LAFAVE, CRIMINAL LAW § 8.12 (3d ed. 2000).

tending to subject some person to hatred, contempt or ridicule; or

(ix) [p]erform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.¹⁴⁶

New York's extortion law, which is similar to the law in many other jurisdictions, and the Model Penal Code,¹⁴⁷ which also includes a provision similar to provision (ix) above, may apply in some cases of status coercion even when the primary purpose of reporting immigration status to the authorities is spite or vengeance, and no material benefit accrues to the extorting party.¹⁴⁸ In many jurisdictions; however, there is an affirmative defense¹⁴⁹ to the crime of extortion which applies if "the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge."¹⁵⁰ In many cases in which immigration status is used coercively, the party seeking advantage will be in a position to have reliable knowledge of the other's immigration status, especially in custody or employment disputes. The second prong of the affirmative defense requires that the alleged extortionist's sole purpose be to compel or induce the immigrant to take "reasonable action" to make good the wrong.¹⁵¹

In that provision there is significant room for effective advocacy on behalf of the immigrant, depending on the level of knowledge of the extorting party. The first obstacle in asserting the affirmative defense for any party, whether an attorney or a lay person, attempting to obtain an advantage or benefit by threatening removal is whether the attempt to seek removal is for the "sole purpose" of having the immigrant seek to correct his or her current immigration status. Unlike the Rules of Professional Conduct which govern an attorney's conduct, purposefully

146. N.Y. PENAL LAW § 155.05(e) (2000).

147. MODEL PENAL CODE § 223.4(7) (1962).

148. N.Y. PENAL LAW § 155.05(e).

149. Though the language of the exculpatory clause often refers to itself as an affirmative defense, New York courts have struck the word "affirmative," since treating the phrase as an affirmative defense would impermissibly shift the burden of disproving an element to the defendant. *See, e.g.,* *People v. Chesler*, 406 N.E.2d 455, 459 (N.Y. 1980).

150. N.Y. PENAL LAW § 155.15(2).

151. *Id.*

vague terms like “substantial purpose” and “legitimate advocacy” are not present. “Sole,” defined as “having no sharer” and “being the only one,” has a clear meaning.¹⁵² Presumably, therefore, any ancillary purpose, such as gaining an advantage in a civil proceeding or even pure spite or vengeance as demonstrated in the home sale anecdote in the Introduction, should not suffice to present a valid affirmative defense.

Additionally, in New York, the affirmative defense is only applicable when the victim would be charged with a crime.¹⁵³ The Model Penal Code contains no such limitation, but it does limit the opportunity to utilize such defense to those occasions where the extorting party “honestly claimed” the property obtained from extortion “as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services.”¹⁵⁴ This relevancy limitation is exceedingly important in that any case in which immigration status is irrelevant or only tangentially related may prohibit the use of this defense against extortionary conduct. Indeed, even where immigration status is relevant to the underlying action, it is unlikely that the property or benefit obtained by the extorting party from threatening or obtaining removal is itself relevant to the damages, if any, sought by the extorting party.

Federal extortion statutes may also be applicable if the extorting party is attempting to obtain an advantage by threatening to inform authorities about federal crimes.¹⁵⁵ The federal extortion statute would most likely be applicable if the unauthorized immigrant had committed a federal crime such as entry without inspection or entry after removal.¹⁵⁶ As both state and federal extortion statutes encompass language defining the crime as a threat to obtain or demand something

152. MERRIAM-WEBSTER COLLEGIATE DICTIONARY 1187 (11th ed. 2003).

153. N.Y. PENAL LAW § 155.15(2); *see* Dawkins v. Williams, 511 F. Supp. 2d 248, 258 (N.D.N.Y. 2007). Immigrants are not criminally liable for unauthorized presence alone. *See* MICHAEL JOHN GARCIA, CRIMINALIZING UNLAWFUL PRESENCE: SELECTED ISSUES, at CRS-2 (2006), <http://trac.syr.edu/immigration/library/P585.pdf> (“[A]n alien found unlawfully present in the U.S. is typically subject only to removal.”). In order for the unauthorized presence to be criminal, something more is needed, and the usual crimes charged are for entry without inspection, unauthorized entry after a removal order, and document fraud. *Id.* Were opposing counsel to threaten criminal charges rather than removal, the affirmative defense could be applicable subject of course to the requirement of “sole purpose.” N.Y. PENAL LAW § 155.15(2).

154. MODEL PENAL CODE § 223.4 (1962).

155. 18 U.S.C. § 873 (1994) (applying the law to any person who demands money or any “other valuable thing”).

156. *See, e.g.*, 8 U.S.C. §§ 1325(a), 1326 (2006).

of value, obvious cases in which the extorting party seeks pecuniary gain seem to clearly constitute extortion, while claims in custody battles also seem to constitute an attempt to obtain something of value to the unauthorized immigrant. Finally, for all actors, even threats to seek the removal of immigrants based on feelings of spite or vengeance may, depending on the jurisdiction, meet the elements of extortion and subject the extorting party to criminal liability.¹⁵⁷

B. Ethical Constraints on Attorneys

It appears fairly clear that attorneys representing unauthorized immigrants are required to maintain their clients' immigration status confidential unless otherwise directed or required by law, and are not required to affirmatively notify opposing counsel or the court of their clients' immigration status.¹⁵⁸ This requirement applies provided that the attorneys do not know that their "[client] intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding,"¹⁵⁹ or the attorneys themselves are not "knowingly . . . fail[ing] to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."¹⁶⁰ Unlawful presence¹⁶¹ or unauthorized entry¹⁶² alone are not likely to trigger required disclosure given that the crime of unauthorized entry is complete upon entry,¹⁶³ and that unlawful presence without more is only a civil violation.¹⁶⁴ Even when an attorney knows that a client possesses false immigration documents, which *may be* considered a continuing crime, it is unlikely that an attorney would have to disclose the client's immigration status unless the "client took some subsequent action in the context of the [current civil] proceedings that affected the integrity of

157. See *supra* note 143 and accompanying text.

158. See Cimini, *supra* note 116, at 385–90 (identifying the tension between attorney-client confidentiality and required mandatory disclosures imposed on attorneys).

159. MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2010).

160. *Id.* R. 4.1(b).

161. Generally, unlawful presence occurs when an individual "is present in the United States after the expiration of the period of stay authorized . . . or is present in the United States without being admitted or paroled." 8 U.S.C. § 1182(a)(9)(B)(ii).

162. Unauthorized or unlawful entry occurs when any individual "enters or attempts to enter the United States at any time or place other than as designated by immigration officers or . . . eludes examination or inspection by immigration officers." *Id.* § 1325(a).

163. See Cimini, *supra* note 116, at 401 (citing *United States v. Rincon-Jimenez*, 595 F.2d 1192, 1193–94 (9th Cir. 1979) (holding that the offense of unlawful entry is completed upon entry to the United States and therefore is not a continuing offense)).

164. See Harry J. Joe, *Illegal Aliens in State Courts: To Be or Not to Be Reported to Immigration and Naturalization Service?*, 63 TEX. B.J. 954, 957 (2000) (noting that unauthorized presence itself is not a criminal offense).

the process, such as lying on the stand or presenting false evidence.”¹⁶⁵

While not affirmatively disclosing a client’s unauthorized immigration status seems a logical extension of the traditional attorney-client privilege,¹⁶⁶ the question is much more difficult when opposing counsel is engaged in litigation tactics specifically aimed at uncovering immigration status.¹⁶⁷ Some attorneys seeking such information may couch their conduct in terms of “zealous advocacy,”¹⁶⁸ even when the status is unrelated to the underlying claim. While there may be a few, select cases where immigration status is relevant to the claim,¹⁶⁹ and therefore properly subject to discovery and disclosure in court, for the vast majority of cases, those attorneys seeking to discover or introduce such evidence should tread carefully in light of their ethical obligations.¹⁷⁰

Regardless of whether immigration status is relevant or not in the underlying civil action, attorneys seeking to discover or introduce immigration status need to be cognizant of several ethical constraints.¹⁷¹ Primary among the ethical obligations are Rules 4.4(a), and 8.4(d). Rule 4.4 provides: “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person”¹⁷² Comment 1 to Rule 4.4(a) notes the burden of zealous advocacy on behalf of a client but tempers such advocacy by prohibiting attorneys from disregarding the rights of third parties through “unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.”¹⁷³

165. Cimini, *supra* note 116, at 404.

166. Professor Cimini notes, however, that there may be instances when the unauthorized immigrant’s attorney desires to disclose the client’s immigration status for strategic reasons, such as establishing credibility, reducing the opponent’s negotiation leverage, or informing the tribunal of the direness of the client’s situation. *Id.* at 408–14.

167. *See, e.g.*, Knauff, *supra* note 19 (setting forth a primer to elicit immigration status in insurance defense).

168. Of note is the fact that the Model Rules of Professional Conduct no longer contain the requirement that attorneys be zealous advocates, except in the Preamble and comments. MODEL R. OF PROF’L CONDUCT Preamble ¶ 2, R. 1.3 cmt. 1 (2010) (stating that a lawyer “must also act with . . . zeal in advocacy upon the client’s behalf.”). The Comment notes however that a lawyer may need to exercise discretion in “determining the means by which a matter should be pursued.” *Id.*

169. *See, e.g.*, *In re Florentino*, No. 25966-4-II, 2002 Wash. App. LEXIS 1896, at *19 (Wash. Ct. App. Aug. 9, 2002) (holding that immigration status may be a relevant factor in the best interests analysis).

170. *See* Cimini, *supra* note 116, at 404.

171. *See infra* Parts III.B.1.

172. MODEL RULES OF PROF’L CONDUCT R. 4.4(a) (2010).

173. *Id.* R. 4.4(a) cmt. 1.

1. Immigration Status Not Relevant or Only Tangentially Related

a. Rules of Evidence

The easier instances of status coercion for attorneys to defend against are those where immigration status is not relevant to the underlying action,¹⁷⁴ only tangentially related, or prohibited from disclosure by local rulings.¹⁷⁵ Relevancy is generally determined by Federal Rules of Civil Procedure 26(b)¹⁷⁶ and its state counterpart prior to trial, and by Federal Rules of Evidence 401¹⁷⁷ and 402,¹⁷⁸ and their state counterparts at trial. In both cases, the rule is not absolute.

174. See, e.g., FED. R. CIV. P. 26(b)(1); FED. R. EVID. 401.

175. Texas, for example, has long kept information pertaining to immigration status away from the jury when not directly relevant. See, e.g., *Basanez v. Union Bus Lines*, 132 S.W.2d 432, 433 (Tex. App. 1939) (reversing a jury verdict based on inflammatory comments made by defense counsel). In *Basanez*, defense counsel closed his arguments in a personal injury action against a bus driver and line as follows:

I don't know about [the plaintiff]; he has been here for eighteen years and has not taken out any of his first papers yet. I don't know who he is, I don't know whether he waded that river or swam. But, I say, Gentlemen of the Jury, when you gentlemen bring in this verdict he will swim that river again, because, I say to you, I think he is all wet in this law suit.

Id. at 432–33.

176. FED. R. CIV. P. 26(b)(1).

Unless otherwise limited by court order, . . . [p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Id. (emphasis added). The Rule 26(b)(1) standard is purposefully broad and allows discovery of inadmissible evidence provided that counsel reasonably believe that such discovery will lead to the discovery of other admissible evidence.

177. FED. R. EVID. 401. “‘Relevant evidence’ means evidence having any tendency to make the existence of any *fact that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence.” *Id.* (emphasis added). The baseline for Rule 401 is that the evidence must be “of consequence to determin[ing] the action.” *Id.* The emphasized language was selected from the California Evidence Code § 210 to avoid any ambiguity that might arise from a materiality standard. 6 CAL. LAW REVISION COMM’N: REPORTS, RECOMMENDATIONS, AND STUDIES 10–11 (1964). As the Notes of Advisory Committee on Rules comments, “[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a ‘material’ fact.” FED. R. EVID. 401 advisory committee’s note.

178. Courts have determined relevancy by inquiring whether the evidence was “relevant to proving a material issue in the case.” See, e.g., *Poole v. State*, 974 S.W.2d 892, 905 (Tex. App. 1998). In Texas, a court has stated the relevancy test is “whether the cross-examining party would be entitled to prove it as a part of his case.” *Bates v. States*, 587 S.W. 2d 121, 133 (Tex. App. 1979).

Federal Rule of Civil Procedure 26 specifically provides that it may be limited by court order,¹⁷⁹ and Federal Rule of Evidence 403 limits the admissibility of *relevant* evidence if the probative value of that evidence “is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”¹⁸⁰ In cases involving unauthorized immigrants, courts have frequently expressed fear of the prejudicial effect that information may have on the finder of fact.¹⁸¹

Attorneys have also attempted to impeach witnesses, party and nonparty alike,¹⁸² on the basis of untruthfulness or the criminal acts of unlawful entry or fraudulent document use.¹⁸³ However, Federal Rules of Evidence 404(b) and 608(b) are both clear in their (in)applicability to the admissibility of prior acts.¹⁸⁴ In both cases, the Rules strongly prohibit evidence of past acts or specific instances of conduct for the purpose of attacking credibility.¹⁸⁵ Even in those instances where an unauthorized immigrant has used fraudulent documents, whether knowingly using another’s social security number or making misrepresentations on employment or drivers’ license forms, courts have

179. FED. R. CIV. P. 26(b)(1).

180. FED. R. EVID. 403. The Advisory Committee commented on the jurisprudence that has been created which excludes evidence, even evidence of unquestioned relevance, when there are circumstances that suggest that such evidence may cause a decision to be formed “on a purely emotional basis.” In those situations, judges are forced to balance the admission of relevant evidence against prejudicial harm that might occur because of its admission. FED. R. EVID. 403 advisory committee’s note (citing M.C. Slough, *Relevancy Unraveled*, 5 U. KAN. L. REV. 1, 12–15 (1956); Herman L. Trautman, *Logical or Legal Relevancy — A Conflict in Theory*, 5 VAND. L. REV. 385, 392 (1952)). In the State of Nebraska, there is also a privilege against responding to any question which could “tend to render the witness criminally liable or to expose him or her to *public ignominy*” NEB. REV. STAT. § 25–1210 (2008) (emphasis added). Ignominy is defined as “deep personal humiliation and disgrace,” or “disgraceful or dishonorable conduct, quality, or action.” MERRIAM-WEBSTER COLLEGIATE DICTIONARY 618 (11th ed. 2003); see also *infra* Part III.B.2.b, discussing the Fifth Amendment privilege of avoiding self-incrimination.

181. See, e.g., *Penate v. Berry*, 348 S.W.2d 167, 168 (Tex. Civ. App. 1961) (striking as prejudicial defense counsel’s argument in a personal injury suit that “in this country you can’t come into court and reach your hands into the pockets of an American citizen and take his property from him—not for an *alien*—they may take away”).

182. See, e.g., *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 241–42 (Tex. 2010).

183. *Id.* at 241.

184. FED. R. EVID. 404(b) (noting that evidence of other crimes, wrongs or acts “is not admissible to prove the character of a person in order to show action in conformity therewith”); *id.* at 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. . . .”). The Rule 609 exception only applies to criminal convictions that are felonies or crimes involving an act of dishonesty or false statement, and was committed within the preceding ten years. *Id.* at 609(a), (b).

185. FED. R. EVID. 404(b), 608(b).

not looked favorably on the argument that unauthorized immigration status is indicative of a lack of truthfulness.¹⁸⁶

TXI Transportation is a remarkable example of an attempt to introduce immigration status in an irrelevant situation.¹⁸⁷ In *TXI Transportation*, the plaintiff in a wrongful death and survivor action sought to bring into evidence the fact that the truck driver employee of the defendant was an unauthorized immigrant.¹⁸⁸ The plaintiff's primary contention and stated purpose for introducing evidence of immigration status was that the unauthorized immigrant would not be truthful in statements to the court as he had previously misrepresented his immigration status.¹⁸⁹ While the line of questioning regarding immigration status was allegedly for impeachment purposes, the plaintiff's counsel referred to the employee's immigration status over forty times; referred to him as an illegal immigrant thirty-five times; referred to his prior deportation seven times; referred to the employee using a "falsified" Social Security number thirty-two times; referred to the employee's license being "invalid" or "fraudulently obtained" sixteen times; and referred to the employee as a "liar" seven times for having stated on his employment application that he was authorized to work in the United States.¹⁹⁰

In this case, the plaintiff also appeared to intentionally seek the removal of the employee immigrant. Plaintiff's counsel asked the investigating Texas State Trooper whether she knew the immigrant was

186. See *TXI Transp. Co.*, 306 S.W.3d at 241–42 (holding that an unauthorized immigrant's inconsistent statements regarding his immigration status and how he obtained a Texas driver's license was not properly admissible for impeachment purposes). The TXI court cited cases from multiple jurisdictions holding that a witness's immigration status is not admissible for impeachment purposes based on the witness's truthfulness or lack thereof. *Id.* at 242 n.7 (citing *First Am. Bank v. W. DuPage Landscaping, Inc.*, No. 00 C 4026, 2005 WL 2284265, at *1 (N.D. Ill. 2009); *Mischalski v. Ford Motor Co.*, 935 F. Supp. 203, 207–08 (E.D.N.Y. 1996); *Castro-Carvache v. INS*, 911 F. Supp. 843, 852 (E.D. Pa. 1995); *Figeroa v. I.N.S.*, 886 F.2d 76, 79 (4th Cir. 1989); *Hernandez v. Paicius*, 134 Cal. Rptr. 2d 756, 761–62 (Cal. Ct. App. 2003)).

187. *TXI Transp. Co.*, 306 S.W.3d at 230.

188. *Id.*

189. See Brief of Appellees at 10–13, *TXI Transp. Co. v. Hughes*, 224 S.W.3d 870 (Tex. App. 2007) (No. 02-04-00242-CV).

190. *TXI Transp. Co.*, 306 S.W.3d at 243. Plaintiff's counsel also questioned TXI's representatives as to whether they believed that "they owed a 'duty' to the public to prevent an 'illegal' from driving a TXI truck." *Id.* In questioning the TXI representative, plaintiff's counsel asked: "You know that he's got an invalid license, correct? . . . [The Department of Public Safety] said it's valid because they don't know he's a liar . . . does the DPS know that he's a liar? Have you told them that?" Brief of Petitioner-Appellant at 13, *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230 (Tex. 2008) (No. 07-0541).

“in this country illegally.”¹⁹¹ Inquiries regarding immigration status to an investigator attempting to determine fault in an automobile accident serve no purpose other than to attempt to incite prejudice. Even conceding that immigration status may have been relevant to the automobile accident investigation and therefore admissible under Federal Rules of Evidence 402, this type of questioning is clearly designed to inflame negative sentiments, and as such should be kept out pursuant to Federal Rules of Evidence 402. In *TXI Transportation*, both the trial court and appellate court disagreed, on differing grounds. The trial court allowed the line of questioning as relevant and not prohibited by Rule 403 after initially granting a motion in limine to keep such evidence out.¹⁹² The court of appeals agreed that there was error, but ruled that any such error was harmless.¹⁹³

The Texas Supreme Court disagreed that the error was harmless quoting the lone dissent at the Court of Appeals, “[the] repeated injection into the case of Rodriguez’s nationality, ethnicity, and illegal-immigrant status, including his conviction and deportation, was plainly calculated to inflame the jury against him.”¹⁹⁴ The Texas Supreme Court concluded: “Such appeals to racial and ethnic prejudices, whether ‘explicit and brazen’ or ‘veiled and subtle,’ cannot be tolerated because they undermine the very basis of our judicial policy.”¹⁹⁵

b. Rules 3.1 & 3.4 – Frivolousness

When engaging in tactics similar to those used in *TXI Transportation*, and indeed, in any cases in which immigration status is not relevant, counsel attempting to discover or admit such evidence should be concerned about Model Rule of Professional Conduct 3.1.¹⁹⁶ Rule 3.1 prohibits an attorney from bringing or defending a proceeding, or arguing an issue therein unless doing so is not frivolous.¹⁹⁷ Where Rule 3.1 presents difficulties to those defending against inquiries into immigration status is that determining whether a claim is “frivolous” is

191. *TXI Transp. Co.*, 306 S.W.3d at 243.

192. *Id.* at 243.

193. *TXI Transp. Co. v. Hughes*, 224 S.W.3d 870, 897 (Tex. App. 2007).

194. *TXI Transp. Co.*, 306 S.W.3d at 244 (Gardner, J., dissenting) (citing *TXI Transp. Co.*, 224 S.W.3d at 931).

195. *Id.* at 245 (citing *Tex. Employers’ Ins. Ass’n v. Guerrero*, 800 S.W.2d 859, 864 (Tex. App. 1990)).

196. MODEL RULES OF PROF’L CONDUCT R. 3.1 (2010).

197. *Id.* Comment 2 provides that an argument or action is frivolous “if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.” *Id.* at cmt. 2.

exceedingly difficult.¹⁹⁸ Additionally, drafters of the 2002 Model Rules of Professional Conduct, in order to make the standard less subjective, deleted language that held an action to be frivolous if it was primarily motivated for the purpose of “harassing or maliciously injuring another.”¹⁹⁹ Rule 3.4 is the corollary to Rule 3.1 for frivolous discovery requests.²⁰⁰ In both instances, the key issue is determining frivolousness.²⁰¹ Therefore, when presented with a case such as *TXI Transportation*, it is difficult to state clearly that the plaintiff’s arguments were frivolous, especially when both the trial and appellate courts acquiesced in the presentation of the immigration-based arguments.²⁰²

c. Rule 4.4 – Substantial Purpose

Of the two primary ethical rules that suggest caution for counsel attempting to utilize some form of status coercion, Rule 4.4(a) is most clearly on point.²⁰³ As noted above, Rule 4.4(a) prohibits action that “ha[s] no substantial purpose other than to embarrass, delay or burden a third person.”²⁰⁴ Impliedly then, Rule 4.4(a) would allow an action intended to embarrass, delay, or burden a third person provided that it did in fact have a substantial purpose,²⁰⁵ although at least one court has suggested that there might be a limit to the type of action taken.²⁰⁶ In cases where immigration status is irrelevant to the underlying action,

198. See RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* 698 (2009) (stating that only when the pleading or argument lacks “any reasonable basis and is designed merely to embarrass or [for] . . . some other ill-conceived or improper motives” would the attorney be subject to disciplinary action (quoting *State v. Anonymous* (1975-5), 326 A.2d 837, 838 (1974))).

199. *Id.* at 700 (quoting MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. 2 (1983)).

200. MODEL RULES OF PROF’L CONDUCT R. 3.4(d).

201. ROTUNDA & DZIENKOWSKI, *supra* note 198, at 769.

202. See *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 233 (Tex. 2010).

203. MODEL RULES OF PROF’L CONDUCT R. 4.4(a).

204. *Id.* Additionally, if the attorney’s actions are so egregious as to disrupt a tribunal, he or she would also be subject to sanctions for violation of R. 3.5(d). MODEL RULES OF PROF’L CONDUCT R. 3.5(d).

205. See *Kligerman v. Statewide Grievance Comm.*, No. CV 95 055 46 20, 1996 Conn. Super. LEXIS 831, at *10 (Conn. Super. Ct. Mar. 21, 1996) (holding that “if there was clear and convincing evidence that there was a substantial *legitimate* purpose for using” the court orders compelling the attendance of a party or witness, “then the committee could not find that the plaintiff violated the rule”) (emphasis added).

206. See *Shepherd v. Am. Broad. Co.*, 62 F.3d 1469, 1484–85 (D.C. Cir. 1995) (“[W]e can imagine a case in which an attorney’s behavior is so harassing that it merits sanctioning, notwithstanding the existence of a substantial purpose.”).

that substantial purpose is likely to be lacking.²⁰⁷ In closer cases, or perhaps where immigration status is relevant yet barred by the court due to potential prejudice, the question is much more difficult. In some cases, it may come down to a determination of what “no substantial purpose” means.²⁰⁸

As might be expected, determining the definition of “substantial purpose” most often, but not always, arises in disciplinary proceedings.²⁰⁹ Massachusetts courts have broadened the scope of the language to mean “some legitimate purpose.”²¹⁰ In *Discipline of an Attorney*, the attorney in question who represented a gas utility submitted, to the trooper’s supervisor, the transcript of the deposition of a state trooper assigned to investigate an explosion.²¹¹ The alleged purpose of such action was to one, “protect his client’s ‘legitimate concerns in other fire and explosion matters,’” and two, for the trooper’s supervisor to “remove the trooper from further fire investigation work and require him to obtain special training,” which action would certainly weigh in the attorney’s favor in attacking the trooper’s credibility in the underlying action.²¹²

In sanctioning this behavior, the court found it did not run afoul of Massachusetts DR 1-102(A)(5) (conduct prejudicial to the administration of justice). The court believed itself to be confronted with balancing zealous, vigorous advocacy against the processes of orderly trial. In this matter, the court held that to sanction the attorney would “‘chill the less courageous attorney in his efforts to represent his

207. See Cimini, *supra* note 116 at 404-05.

208. The difficulty in determining a substantial purpose has been present since the rule’s creation. In the February 1983 Midyear Meeting of the Commission on Evaluation of Professional Standards (the “Kutak Commission”), which was drafting the model rules, a proposal was put forward to eliminate the rule entirely on the grounds that “[it] calls for subjective standards . . . [and] is vague, indefinite and without standards of measure.” CTR. FOR PROF’L RESPONSIBILITY: AM. BAR ASS’N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at 554 (2006) [hereinafter A LEGISLATIVE HISTORY]. The former Model Code of Professional Conduct was no clearer in its limitations. MODEL CODE OF PROF’L CONDUCT DR 7-106(C)(2) (1980) (allowing questions that are degrading if relevant to the case); DR 7-102(a)(1), 7-108(D) (prohibiting action or questions that are designed “merely to harass”).

209. See, e.g., *Kligerman*, 1996 Conn. Super. Lexis, at *10. *Contra* Mass. Inst. of Tech. v. ImClone Systems, Inc., 490 F. Supp. 2d 119, 127 (D. Mass. 2007) (ruling on a protective order and imposition of sanctions for improprieties in the manner and purpose of questioning in a deposition).

210. *ImClone*, 490 F. Supp. 2d at 125 (citing *In re Discipline of an Atty.*, 815 N.E.2d 1072, 1079 (Mass. 2004)). In *ImClone*, the attorney was sanctioned for questions that were aimed at depriving MIT of an expert witness by having the witness’s employer prevent or disrupt his cooperation with MIT by providing his testimony. See *id.* at 126.

211. *Discipline of an Atty.*, 815 N.E.2d at 1076.

212. *Id.* at 1077.

client effectively.”²¹³

Reading “substantial” as “legitimate” does serious disservice to the purpose and scope of Rule 4.4, and is more akin to the New York State Bar Association’s proposed amendment to the Rule which would have deleted “substantial” altogether when the Rule was being debated in 1983.²¹⁴ In *Kligerman*, the court combined the “substantial” and “legitimate” tests to require counsel to demonstrate a “substantial legitimate purpose” when taking action that may “have the incidental effect of causing” harassment or embarrassment to a third party.²¹⁵

In 2007, the Kansas Supreme Court was faced with interpreting the scope of Rule 4.4.²¹⁶ In the Kansas case, the attorney proposed an entirely subjective test based solely on the actor’s perception of the situation.²¹⁷ The Kansas Supreme Court rejected the pure subjective approach, but reaffirmed its prior decision noting that while an attorney’s subjective motive or purpose is relevant, the ultimate decision is to be made on an objective basis.²¹⁸ The *Comfort* court concluded: “A lawyer cannot escape responsibility for a violation based on his or her naked assertion that, in fact, the ‘substantial purpose’ of conduct was not to ‘embarrass, delay or burden’ when an objective evaluation of the conduct would lead a reasonable person to conclude otherwise.”²¹⁹

In *Comfort* the court recognized that the attorney “had legitimate objectives,”²²⁰ but found that the means employed “served no substantial purpose other than to embarrass [opposing counsel].”²²¹ In *Royer*, the

213. *Id.* at 1080 (citing *Sussman v. Commonwealth*, 374 N.E.2d 1195, 1199 (Mass. 1978)).

214. See A LEGISLATIVE HISTORY, *supra* note 208, at 555.

215. *Kligerman v. Statewide Grievance Comm.*, No. CV 95 055 46 20, 1996 Conn. Super. Lexis 831, at * 9 (Conn. Super. Ct. Mar. 21, 1996).

216. *In re Comfort*, 159 P.3d 1011 (Kan. 2007). In Kansas, “substantial” is defined in the Kansas Rules of Professional Conduct as that which “denotes a material matter of clear and weighty importance.” KAN. R. OF PROF’L CONDUCT Terminology 1.0(m) (1988).

217. *Comfort*, 159 P.3d at 1019.

218. *Id.* at 1020 (citing *In re Royer*, 78 P.3d 449, 454 (Kan. 2003)); accord *Att’y Grievance Comm’n of Md. v. Link*, 844 A.2d 1197, 1212–13 (Md. 2004) (Raker, J., concurring) (noting that courts must look to the purpose of the alleged wrongdoer’s actions, rather than the effect in a Rule 4.4 disciplinary action).

219. *Comfort*, 159 P.3d at 1020. *Contra* *Shepherd v. Am. Broad. Co.*, 62 F.3d 1469, 1483 (D.C. Cir. 1995) (noting that determining whether behavior is unprofessional under Rule 4.4 depends on the attorney’s perspective).

220. *Comfort*, 159 P.3d at 1021.

221. *Id.*; see also *Royer*, 78 P.3d at 454 (holding that legitimate goals may not be pursued through means that serve no substantial purpose other than burdening the opposition). In *Comfort*, the reprimanded attorney disseminated a letter alleging a conflict of interest against opposing counsel to the city manager, city attorney, the city clerk and public information officer, and five city commissioners. 159 P.3d at 1015–16.

Kansas Supreme Court was confronted with an attorney who facilitated the sale of a soon-to-be condemned building to an indigent third party for \$1. In facilitating the sale, the attorney's goals were to transfer the ownership of property from his client prior to condemnation or demolition that his client would be required to pay for, and to transfer the financial burden of demolition to the indigent individual, and therefore, indirectly to the city who would then have to bear the cost.²²²

The *Royer* Court analogized respondent's actions to a similar case in Kentucky, where the Kentucky Supreme Court found that, "even though [counsel's] actions served a legitimate purpose and an illegitimate purpose," counsel had violated Rule. 4.4.²²³ In *Royer*, the respondent was disciplined even though one member of the hearing panel objected to the violation of Rule 4.4 given that even though counsel embarrassed, delayed, and unreasonably burdened two third parties, his "substantial purpose of advancing his clients' financial interests precludes a finding of violation of [Rule] 4.4."²²⁴

How then should attempts to introduce immigration status be treated under Rule 4.4(a)? It appears that the favored interpretation of Rule 4.4(a) requires a "substantial" purpose, and of the courts that have used the term "legitimate," it seems that the proper reading should be that an attorney's purpose in introducing immigration status must be *both* legitimate and substantial.²²⁵ Legitimate purposes alone should not suffice according to the plain language of Rule 4.4(a), and an illegitimate although substantial purpose should likewise not be given weight by any tribunal.

However, even this favorable reading of 4.4(a) for attorneys defending against status coercion may be insufficient to help the immediately affected client. Potential remedies, both civil and immigration, are discussed below,²²⁶ but the affected attorney should be careful in how to respond to such tactics in order to avoid professional misconduct.²²⁷ Simply reporting ethical misconduct, when such reporting

222. *Royer*, 78 P.3d at 454.

223. *Id.* (citing *Kentucky Bar Ass'n v. Reeves*, 62 S.W.3d 360, 365 (Ky. 2002)). Kentucky's Supreme Court further enhanced the strength of Rule 4.4 by requiring the respondent to "have had a solely legitimate 'substantial purpose.'" *Id.*

224. *Id.* at 456.

225. *See, e.g., id.*

226. *See infra* Parts IV.A. & B.

227. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-383 (1994) (noting that although the Model Rules do not expressly prohibit threatening disciplinary charges to gain an advantage in a civil proceeding, the ABA Ethics Committee concluded that such action would be a disciplinary violation of Rule 4.4 and possible 8.4(d)).

would not likely be construed as being carried out to seek advantage, should not violate the Model Rules.²²⁸

Therefore, when immigration status is irrelevant to the underlying action, as it seemed to be in *TXI Transportation*, it is difficult to conclude that there was a substantial, legitimate purpose other than to embarrass and inflame hostile anti-immigrant sentiment. Under such a reading then, plaintiff's counsel would have violated Rule 4.4. If immigration status is tangentially related, and therefore possibly relevant,²²⁹ the argument for seeking disciplinary action is more difficult, but not impossible. In both *Shepherd* and *Royer*, the courts allowed that a substantial purpose alone may *not* be sufficient depending on the illegitimate purpose involved.²³⁰ In a case where the illegitimate purpose is to create bias in the finder of fact, public policy should strongly favor a finding of misconduct.²³¹ One of the clearest stated purposes of the Model Rules of Professional Conduct is that lawyers should "use the law's procedure only for legitimate purposes and not to harass or intimidate others."²³²

The difficulty in imposing sanctions in the cases where immigration status is tangentially related comes from proving that counsel's stated purpose in discovering or introducing such information is either illegitimate or insubstantial. Referring again back to *TXI Transportation*, both the trial court and court of appeals allowed the line of questioning directed at immigration status to stand.²³³ Therefore, the job of the attorney from the Board of Professional Responsibility to show a violation of Rule 4.4 is much more difficult, at least in the present. As the issue of status coercion and its reach becomes better known, judges, as well as opposing counsel, will be left with less of a safe harbor than they currently believe themselves to have.

228. *Id.* However, as with determining the definition of "substantial purpose" it is not clear what standard (objective or subjective) would be used to determine if an advantage was being sought.

229. *See* FED. R. EVID. 401.

230. *See* *Shepherd v. Am. Broad. Co., Inc.*, 62 F.3d 1469, 1483–84 (D.C. Cir. 1995); *Royer*, 78 P.3d at 454.

231. Lawyers, as "officer[s] of the legal system and . . . public citizen[s] having special responsibility for the quality of justice" should not be allowed to utilize the court system or the threat of litigation as a tool for inciting prejudice. MODEL RULES OF PROF'L. CONDUCT Preamble para. 1 (2010).

232. *Id.* para. 5. The concepts of respect for the legal system, improving access to the legal system, the administration of justice, and the public's understanding of and confidence in the judicial system permeate the preamble of the Rules of Professional Conduct as well as the rules themselves. *Id.* at paras.5–8, 13.

233. *TXI Transp. Co. v. Hughes*, 224 S.W.3d 870 (Tex. App. 2007); *Hughes v. TXI Transp. Co.*, No. 03-05-379, 2004 WL 5174740 (Tex. Dist. Ct. Sept. 20, 2004).

As a final thought on the scope of Rule 4.4, it will be difficult for affected counsel and the judges involved to determine when immigration status is irrelevant, or a lack of substantial purpose present, as counsel who attempt to seek such information become more creative. As seen in the *Idaho Custody Case*, the issue was purportedly one of driving privileges.²³⁴ Additionally, courts in custody cases have been persuaded by arguments that legal guardians should be lawfully present in case medical treatment is needed for which consent is required.²³⁵ If the issue is a tort action in a motor vehicle accident, aggressive counsel will likely argue that the unauthorized immigration status is relevant as the individual involved either obtained a license fraudulently or was driving without a license or insurance. In any of these scenarios, it is easy to see how low the bar is in determining relevancy. In these situations, it will be incumbent on counsel opposing such tactics *and on the judiciary* to resist these tactics when it is clear that the primary purpose is to harass as defined under Rule 4.4(a), or to engage in conduct prejudicial to the administration of justice under Rule 8.4(d).²³⁶

d. Rule 8.4 – Conduct Prejudicial to the Administration of Justice

The second most relevant Model Rule of Professional Responsibility is Rule 8.4(d) which provides that “[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.”²³⁷ Comment 3 to Rule 8.4 is illustrative:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of [Rule 8.4].²³⁸

While immigration status itself is not mentioned in the comment,

234. See case cited *supra* note 79.

235. See case cited *supra* note 79.

236. MODEL RULES OF PROF’L CONDUCT R. 8.4(d) (2010).

237. *Id.*

238. *Id.* R. 8.4(d) cmt. 3.

there is a colorable argument that in many cases discrimination based on an individual's unauthorized immigration status is simply a proxy for national origin-based discrimination. In addition, the argument that only suspect classes under a traditional due process or equal protection analysis are protected under the language of Rule 8.4(d) and its accompanying Comment 3 ring hollow as sexual orientation and socioeconomic status are not suspect classes.²³⁹ Indeed, the language identifying protected categories is contained only in the Comment, not the Rule. Therefore, even if immigration status is not considered to fall within the penumbra of national origin, discrimination based on it or any other category that is demonstrative of a prejudice arguably results in a violation of Rule 8.4(d) as such conduct adversely affects the administration of justice.

The phrase "legitimate advocacy" does not violate paragraph (d), and it is similar in its effect to Rule 4.4(d)'s "substantial" modifier, Federal Rules of Evidence 403 "substantially outweighed," and Rule 3.1's interpretation that an argument or action must not be "primarily motivated" for harassment. In every instance, conduct or evidence that is prejudicial may be allowed into an action, but only to a certain point along the continuum. Whereas the other concessions were made to encourage advocacy, the Rule 8.4 concession was made, at least partially, due to concerns over free speech.²⁴⁰ The problem of course, as with Rule 4.4, is that neither the Rule nor the comment defines what represents legitimate advocacy.²⁴¹

Beginning in 1994 with the ABA Young Lawyers Division, several proposals were submitted over the years which would have codified the now-current Comment 3.²⁴² The ABA Standing Committee on Ethics and Professional Responsibility reacted to the proposal at the February 1994 ABA Midyear meeting with a modification. In it, the Standing

239. See, e.g., *Lawrence v Texas*, 539 U.S. 558, 594 (2003) (striking down a law outlawing sodomy due to its failure of a rational-basis test); cf. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973) (holding that a school financing system based on inherently inequitable property tax distribution was not subject to strict scrutiny even though the result was substantially different educational experiences for students depending on whether they resided and attended schools in more or less affluent neighborhoods); *Witt v. Dep't of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008) (applying intermediate scrutiny to a case involving the armed forces' policy of Don't Ask, Don't Tell).

240. See ROTUNDA & DZIENKOWSKI, *supra* note 198, at 1222–25.

241. *Id.* at 1224; MODEL RULES OF PROF'L. CONDUCT RULE 8.4(d) cmt. 3.

242. A LEGISLATIVE HISTORY, *supra* note 208, at 812–18. The Young Lawyers Division in 1994 submitted the first proposal which would have explicitly prohibited harassing and discriminatory conduct in any legal proceeding, whether in a court room or not. *Id.* The amendment was withdrawn prior to a vote. *Id.*

Committee put forth for the first time the language of “legitimate advocacy.”²⁴³ In a proposed comment, the Standing Committee provided the only explanatory text regarding “legitimate advocacy” suggesting “[p]erhaps the best example of [conduct that manifests bias yet is legitimate advocacy] is when a lawyer employs these factors, when otherwise not prohibited by law, in selection of a jury.”²⁴⁴

Following the initial inability to adopt a formal rule prohibiting discriminatory or biased conduct, the ABA Criminal Justice Section in 1998 proposed a broader version of 8.4(d) that would have held it to be professional misconduct for a lawyer to act in any discriminatory fashion if the purpose was to abuse anyone involved in the judicial process, “to gain a tactical advantage” or to harass.²⁴⁵ However, like its predecessors, this proposal was also withdrawn prior to any vote.²⁴⁶ Finally, in 1998, the current version of Comment 3 was proposed and adopted at the 1998 ABA Annual Meeting.²⁴⁷ Therefore, in terms of status coercion, attorneys are again left reading tea leaves to determine in what circumstances the introduction of immigration status represents legitimate advocacy.

Reported cases on what constitutes “legitimate advocacy” are few, and the ones that are reported, generally, are those where the improper behavior is clearly egregious.²⁴⁸ The disciplined attorney in *In re Thomsen*, while representing the husband, made repeated references in

243. See A LEGISLATIVE HISTORY, *supra* note 208, at 813.

244. *Id.* Like the former proposal, this one was also withdrawn prior to any vote. *Id.* at 814–16. As neither the Young Lawyers Division proposal nor the Standing Committee proposal were voted on, the Standing Committee adopted a policy statement, drafted by the Young Lawyers Section, at the February 1995 Midyear Meeting which provided in part that the ABA condemns any action, words, or conduct by lawyers which are biased or prejudicial against anyone involved in the judicial process. *Id.*

245. See A LEGISLATIVE HISTORY, *supra* note 208, at 814 (emphasis added).

246. *Id.*

247. *Id.* at 817. At the time this rule was adopted, there was much discussion and concern over the use of bias and prejudice in jury selection. *Id.* The comment was to emphasize that a trial judge’s determination in a *Batson* challenge was not determinative, and the allegedly-offending lawyer would not be subject to discipline until the relevant state disciplinary body found a violation of Rule 8.4. *Id.* A “*Batson* challenge” occurs when counsel objects to a juror’s exclusion because of perceived improper and/or unconstitutional grounds such as race or sex. *Batson v. Kentucky*, 476 U.S. 79, 97–98 (1986) (holding that prosecutors may not peremptorily challenge potential jurors solely on account of their race as such conduct is prohibited by the Equal Protection Clause).

248. See, e.g., *In re Thomsen*, 837 N.E.2d 1011, 1012 (Ind. 2005) (disciplining attorney for repeated references to a “black man” and “black guy” in a marital dissolution action). This 2005 case was a case of first impression for the court as it pertained to Indiana Professional Conduct Rule 8.4(g), Indiana’s rule which prohibits lawyers from engaging in any race-based conduct that is biased or prejudicial. *Id.* at 1011–12.

a divorce proceeding of the wife's presence around town with a "black man."²⁴⁹ The court held that such conduct was offensive, was unprofessional, and would serve to encourage future intolerance.²⁵⁰ The issue of legitimate advocacy was easily dealt with as the court noted that both parties stipulated that the man's race was irrelevant to the dissolution proceeding.²⁵¹

Similarly, in *United States v. Kouri-Perez*, the court held that "unnecessary and offensive references to ancestry" violated Rule 8.4.²⁵² Therefore, as noted above in reference to Rule 4.4, when immigration status is irrelevant to the underlying action, any comments regarding such status should be considered unnecessary and not representative of any type of legitimate advocacy. Applying Rule 8.4 to closer questions of relevancy is more difficult.

In Kansas, the burden of proof for a violation of Rule 8.4 is showing "prejudice to the administration of justice."²⁵³ In applying that standard, Kansas courts look at harm that is "'hurtful,' 'injurious,' [or] 'disadvantageous.'"²⁵⁴ While the standard is less than clear, courts have upheld it against challenges based on vagueness.²⁵⁵ In fact, its breadth may be beneficial to attorneys combating the use of status coercion. It appears that if immigration status is ever invoked when such status is irrelevant to the underlying action, such invocation is almost necessarily "hurtful," and if the immigration status once disclosed is used to enable a removal of the immigrant, the conduct is almost certainly injurious or disadvantageous to the immigrant.

249. *Id.* at 1012.

250. *Id.*

251. *Id.*

252. *United States v. Kouri-Perez*, 8 F. Supp. 2d 133, 139 (D.P.R. 1998) (sanctioning attorneys for unnecessary intrusion into and publication of the ancestry of an Assistant U.S. Attorney).

253. *In re Comfort*, 159 P.3d 1011, 1023 (Kan. 2007).

254. *Prunty v. Consol. Fuel & Light Co.*, 108 P. 802, 803 (Kan. 1910) (citing Webster's Universal Dictionary).

255. See *Howell v. State Bar of Tex.*, 843 F.2d 205, 208 (5th Cir. 1988) (noting that although hypothetical situations testing the vagueness of a rule of professional conduct, in this case Rule 1.02, could be imagined, such a rule should not be struck down when it has many valid uses); *Comfort*, 159 P.3d at 1024 (citing *In re Anderson*, 795 P.2d 64, 67 (Kan. 1990)); *Att'y Grievance Comm. of Md. v. Alison*, 565 A.2d 660, 667 (Md. 1989) (noting the "regulation at issue herein applies only to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the 'lore of the profession.'" (quoting *In re Snyder*, 472 U.S. 634, 645 (1985)); *In re Williams*, 414 N.W.2d 394, 397 n.8 (Minn. 1987). *Contra* John F. Sutton, Jr., *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497, 517 (1979) (arguing for a standard that would be "realistic and susceptible of uniform, regular enforcement"). Dean Sutton was the Reporter for the ABA Special Committee on Evaluation of Ethical Standards which drafted the *Model Code*.

It appears, therefore, that conduct that is “legitimate advocacy” is not just non-frivolous advocacy which Rules 3.1 and 3.4 already govern, but is something more, and that “something” appears to be determined by relevancy and purpose. However, while these potential claims of misconduct are easily made in the abstract, disciplinary boards and courts may be loath to impose sanctions on conduct that has not clearly been labeled “prejudicial” in the past and which is not clearly frivolous.²⁵⁶ To remedy that fault, counsel combating the coercive use of status should put both the court and opposing counsel on notice as early as possible that it considers such action to be misconduct.²⁵⁷ As one court aptly remarked: “Zealous advocacy never requires disruptive, disrespectful, degrading or disparaging rhetoric.”²⁵⁸ Attorney conduct or questioning that focuses on one aspect of a client or witness, especially when irrelevant to the underlying matter, would appear to fall in that description.

e. Threatening Action to Gain Advantage

In the former Model Code of Professional Responsibility, it was misconduct to present or threaten to present criminal charges “solely to obtain an advantage in a civil matter.”²⁵⁹ While that provision failed to make it into the Model Rules of Professional Conduct,²⁶⁰ the ABA Committee on Ethics and Professional Responsibility has issued a Formal Opinion stating that, although such conduct is not expressly prohibited, threatening criminal charges to gain an advantage in a civil proceeding would be misconduct if the alleged criminal act was not relevant to the civil claim, if the lawyer did not believe the criminal charges to be well-founded, or if the threat could be considered an attempt to encourage the misperception of improper influence.²⁶¹

256. See, e.g., *Howell*, 843 F.2d at 208.

257. See *infra* Part IV.A. regarding techniques to be used prior to and during civil proceedings to protect against status coercion.

258. *In re Abbott*, 925 A.2d 482, 489 (Del. 2007).

259. MODEL CODE OF PROF'L CONDUCT DR 7-105(A) (1980).

260. The omission was deliberate. See GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* 40-8 (3d ed. Supp. 2008) (noting the prohibition was considered redundant of other rules).

261. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363 (1992).

It follows also that the Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim for relief, to refrain from pursuing criminal charges against the opposing party as part of a settlement agreement, so long as such agreement is not itself in violation of law.

Similar to the Model Rules outlined above, under the Model Code the criminal charges must not have been threatened “solely” to obtain an advantage in a civil proceeding. The ABA opinion purposefully omitted the “solely” issue, and instead focused on relevancy.²⁶² Presumably then, in order for the threat of criminal action to be validly made, it must be relevant to the underlying civil action, well-founded, and not purport an improper influence over the criminal process. Only if all three criteria are met would the “threat []be ethically permissible under the Model Rules.”²⁶³

Assuming, as we have in this Part, that immigration status is irrelevant or only tangentially related to the underlying action, a threat of removal should therefore be improper under Formal Opinion 92-363, and by extension Rule 8.4, as being prejudicial to the administration of justice.²⁶⁴ The lynchpin in the analysis, however, is whether threatening removal is equivalent to threatening criminal proceedings. In some ways the two proceedings are very similar. In both immigration and criminal proceedings, charges may only be brought by government attorneys, the process is adjudicated by a judge, and the party found guilty is subject to some type of sanction. There are differences which suggest that the two processes are not equivalent. Immigration judges are employees of the Executive Office of Immigration Review, an office of the Department of Justice, and subject to dismissal by the Attorney

Id. Other states retained the Model Code approach. *See, e.g.,* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 404(b)(1) (1989) (prohibiting a lawyer from threatening criminal or disciplinary charges to gain advantage in a civil matter).

262. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363.

While the Model Rules contain no provision expressly requiring that the criminal offense be related to the civil action, it is only in this circumstance that a lawyer can defend against charges of compounding a crime . . . A relatedness requirement avoids exposure to the charge of compounding, which would violate Rule 8.4(b)'s prohibition against “criminal act[s] that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.” It also tends to ensure that negotiations will be focused on the true value of the civil claim, which presumably includes any criminal liability arising from the same facts or transaction, and discourages exploitation of extraneous matters that have nothing to do with evaluating that claim. Introducing into civil negotiations an unrelated criminal issue solely to gain leverage in settling a civil claim furthers no legitimate interest of the justice system, and tends to prejudice its administration.

Id.

263. *Id.*

264. *Id.*

General.²⁶⁵ In addition, the Supreme Court has held that deportation (now removal) is not punishment.²⁶⁶

There is then, the possibility that a disciplinary board could find that threatening or procuring the removal of an individual is not tantamount to threatening criminal proceedings, but such outcome should be unlikely. Given the similarities of the outcomes to the participants involved — an adjudicative process initiated by the government that results in loss of freedom — regardless of the Supreme Court definition of punishment, a disciplinary board tasked with eliminating bias and irrelevant conduct aimed solely at obtaining an advantage in a civil proceeding should equate the two and find a violation of Rule 8.4 where immigration status is irrelevant or only tangentially related to the underlying action even when opposing counsel has a well-grounded belief in the unauthorized status of the immigrant.²⁶⁷ Furthermore, given Formal Opinion 94-383 which prohibits threatening disciplinary actions, which *are* structurally very similar, to seek an advantage, a disciplinary

265. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2273 (2002) (codified as amended at 6 U.S.C. §§ 521, 522 (2002)).

266. See *Ting v. United States*, 149 U.S. 698, 730 (1893) (stating the deportation “proceeding . . . is in no proper sense a trial and sentence for a crime or offence. . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions” upon which his residency depends); see also, *Mahler v. Eby*, 264 U.S. 32, 39 (1924); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913). *Contra* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 *passim* (2000). The primary effect of ruling that deportation (removal) is not punishment is that the criminal procedure provisions of the Constitution are therefore inapplicable in immigration proceedings. See Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Provisions Must Apply*, 52 ADMIN. L. REV. 305, 309–10 (2000) (noting that by determining that immigration cases are not punishment, the rights of trial by jury, assistance of counsel, the exclusionary principle from the freedom from unreasonable search and seizure, the prohibition against cruel and unusual punishment, etc. do not apply).

267. The ABA Commission on Ethics and Professional Responsibility has also promulgated an opinion on the threatened use of disciplinary proceedings to gain advantage in a civil matter. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-383 (1994). The Opinion stated that, like the prohibition on threatening criminal proceedings:

Such a threat may not be used as a bargaining point when the subject misconduct raises a substantial question as to opposing counsel’s honesty, trustworthiness or fitness as a lawyer. . . . Such a threat would also be improper if the professional misconduct is unrelated to the civil claim, if the disciplinary charges are not well founded in fact and in law, or if the threat has no substantial purpose or effect other than embarrassing, delaying or burdening the opposing counsel or his client, or prejudicing the administration of justice.

Id.

board should not be dissuaded from sanctioning the threat of removal.²⁶⁸

f. Rule 8.4(b) – Criminal Acts

Rule 8.4(b) states that it is professional misconduct for a lawyer to commit a criminal act that calls into question that lawyer’s “honesty, trustworthiness or fitness as a lawyer.”²⁶⁹ While any crime may reflect adversely on a lawyer, traditionally only crimes of “moral turpitude” have resulted in sanctions under Rule 8.4(b).²⁷⁰ A crime such as extortion as discussed in Part II.A,²⁷¹ would seem to be one of the clearest violations of the rule as such behavior shows a lack of honesty and trustworthiness.²⁷²

Even if a party attempting to gain advantage by threatening criminal charges (or perhaps removal in other jurisdictions), reasonably believes the charges to be well-founded and either relevant or the sole purpose depending on the jurisdiction, if there is no substantial purpose in making the threat other than to harass or embarrass, counsel for the extorting party would be subject to disciplinary proceedings for violating Rule 4.4(a).²⁷³ Attorneys seeking to gain an advantage by threatening to adversely use opponent’s immigration status should strongly consider whether their conduct would violate either criminal law or disciplinary rules, and therefore also result in a subsequent violation of Rule 8.4.²⁷⁴

268. *Id.* While Formal Opinion 94-383 noted that there may be limited circumstances under which Model Rule 8.3(c) may allow a lawyer representing a victim of legal malpractice to settle the malpractice case with the offending lawyer conditioned upon nondisclosure of the malpractice (which implicitly threatens disclosure), any lawyer considering such course of action should make sure that the proposed threat complies with both the Model Rules and criminal law. *Id.* It appears that the primary reason for allowing this type of threat is that the harmed party is made whole through valid restitution or compensation from the offending party in those limited circumstances when neither the elements of coercion are present and there is no required reporting of ethical misconduct.

269. MODEL RULES OF PROF’L CONDUCT R. 8.4(b) (2010).

270. *Id.* R. 8.4(b) cmt. 2.

271. *See supra* Part II.A.

272. Section 5.11 of the ABA Standards for Imposing Lawyer Sanctions corresponds to a violation of Rule 8.4(b), and provides “disbarment is generally appropriate when (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, *extortion*, misappropriation, or theft . . .” ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 5.11(a) (1986, *as amended* 1992) (emphasis added); *see also* Bd. of Prof’l Responsibility v. Meenan, 85 P.3d 409 (Wy. 2004) (disbarring attorney for conduct including extortion). In other jurisdictions, the crime may be defined as “blackmail.” *See, e.g.*, S.C. CODE ANN. § 16-17-640 (1992) (defining blackmail as the extortion of money or anything of value by threatening individuals with certain prohibited types of intimidation, such as provided in New York’s extortion statute).

273. MODEL RULES OF PROF’L CONDUCT R. 4.4(a); *see Cimini, supra* note 116, at 407.

274. MODEL RULES OF PROF’L CONDUCT R. 8.4.

As one commentator put it, “Little distinguishes a lawyer who resorts to blackmail to coerce private advantage from a mob goon wielding a baseball bat Lawyers who fail to understand that symmetry invite ethical punishment, criminal prosecution and disgorgement of anything gained by themselves or their clients”²⁷⁵

g. Rule 8.4(a) - Acting Vicariously

Attorneys attempting to introduce evidence of immigrant status or seeking the removal of the opposing party should be ethically prohibited from doing so under the various rules cited above. These attorneys should also be prohibited from counseling their clients to themselves report the immigrant.²⁷⁶ Such behavior is not similar to the Rule 4.2 exception that allows parties to communicate directly even though both have legal representation.²⁷⁷ Take the following example where the attorney seeking removal states something along the lines of “although I am prohibited from contacting immigration authorities to report the opposing party, and I cannot counsel you to do so, *you* are not bound by any rules were you to independently report the immigrant.” This type of behavior is not akin to allowing both parties to discuss the matter without representation should they choose to, but is much more similar to the attorney prodding his client to act in a way in which he or she would be prohibited from acting. To state it another way, the proposed language is more like requesting his client to pass along a message from the attorney to the opposing party, which is prohibited, than it is simply allowing the parties to discuss the matter.²⁷⁸

2. Relevancy – When Unauthorized Immigrant Status Should Matter

While immigration status should remain off limits in the vast majority of civil disputes, there are a slight amount of cases where it is undeniably a central part of the contested issue and as such, it could be properly before a finder of fact.²⁷⁹ The central question, therefore, is

275. See John Freeman, *Blackmail and You*, S.C. LAW., July 17, 2005.

276. MODEL RULES OF PROF'L CONDUCT R. 8.4(a). While the North Carolina ethic's opinion on point did not specifically address the issue, Rule 8.4(a) clearly states that it is also misconduct for an attorney to “knowingly assist or induce another” to violate the rules or to “do so through the acts of another.” *Id.*

277. *Id.* R. 4.2.

278. See ROTUNDA & DZIENKOWSKI, *supra* note 198, at 1234–35 (citing THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 148 (ABA 1987)).

279. See *supra* Parts II.B. and II.C (noting the relevancy of immigration status in an action for lost wages or unlawful failure to hire, as well as in some family court proceedings). In regards to the family court proceedings, some commentators have argued that immigration

how to best handle the issue from the immigrant's perspective, as well as limiting any adverse incidental actions such as the initiation of removal proceedings by the opposing party, its counsel, judicial employees, or witnesses to a proceeding.

a. Confronting the Issue

Even though immigration status may be relevant to the particular dispute, opposing counsel must still limit their actions to ethically sanctioned conduct.²⁸⁰ In North Carolina, for example, the State Bar's Ethics Opinions unambiguously state, regardless of relevancy, that opposing counsel may not threaten reporting the immigrant to immigration authorities, nor may the counsel simply report the immigrant to immigration authorities. Furthermore, simply because immigration status is relevant, does not mean it will pass Rule 403's prohibition against unfair prejudice and confusion of the issue.²⁸¹

While Rule 3.1's relatively low threshold of no frivolous arguments may be inapposite, Rules 4.4 and 8.4 are much less so.²⁸² While allowing evidence or testimony of immigration status may be required in some instances, the manner in which it is done may still be policed. Prejudicial statements regarding immigration status have been grounds for reversals of trial court decisions in the past, and would likely continue to present problems for counsel if the manner in which the evidence is introduced is to embarrass a third person with no other substantial purpose,²⁸³ or is unfairly prejudicial to the administration of justice.²⁸⁴

In the *Shepherd* and *Royer* cases discussed above, even a substantial purpose was ineffective in combating an alleged Rule 4.4 violation. Likewise, counsel seeking safe-harbor by arguing that their tactics constitute legitimate advocacy may still run afoul of Rule 8.4's prohibition on conduct prejudicial to the administration of justice depending on the manner in which the evidence is sought, obtained, or entered into evidence.²⁸⁵ In one case, a former attorney of the

status should not be used in any context. See, e.g., Julie Linares-Fierro, Comment, *A Mother Removed – A Child Left Behind: A Battered Immigrant's Need for a Modified Best Interest Standard*, 1 SCHOLAR 253, 319–21 (1999).

280. See *supra* notes 54–57 and accompanying text.

281. FED. R. EVID. 403.

282. MODEL RULES OF PROF'L CONDUCT R. 4.4(a), 8.4(d) (2010).

283. See *Shepherd v. Am. Broad. Co.*, 62 F.3d 1469, 1483–84 (D.C. Cir. 1995); *In re Royer*, 78 P.3d 449, 454 (Kan. 2003).

284. *Royer*, 78 P.3d at 454.

285. See, e.g., *In re Abbott*, 925 A.2d 482, 485 (Del. 2007) (noting that sarcastic and

immigrant, who was to represent the immigrant with an immigration application, threatened the immigrant with disclosure of certain confidential information if the immigrant were to file a grievance against the petitioner. Although the immigration status of the immigrant was relevant to the case in establishing the alleged attorney-client relationship, the court found numerous ethical violations in the conduct of the attorney.²⁸⁶

Therefore, actions such as making repeated statements regarding immigrant status in a judicial setting, notifying or inviting immigration enforcement personnel to civil proceedings, threatening to report the immigrant to immigration authorities, reporting the immigrant to immigration authorities, and any other action determined to be status-based coercion should be prohibited even when immigration status is relevant to the underlying proceeding on the grounds that such actions are prejudicial to the administration of justice, done for the primary purpose of harassment, highly prejudicial, and perhaps even frivolous.²⁸⁷

b. Initial Strategic Options

If immigration status is relevant and presented properly in an adjudicative setting, the immigrant has fewer options available to him or her. One option is strategic, proactive disclosure.²⁸⁸ While benefits might include removing leverage from the opposition, establishing credibility with the finder of fact, and educating the bench, even proponents of this strategy recognize that it is highly risky and that the risks may substantially outweigh the benefit.²⁸⁹ At the other end of the spectrum is simply counseling the client to refrain from pursuing his or her claim.²⁹⁰ While unattractive, it likely guarantees that the client meets one of his or her goals in remaining undetected by immigration authorities. An additional option is to attempt to claim a privilege, such

inflammatory use of language is disruptive to the judicial process and prejudicial to the administration of justice).

286. See *Statewide Grievance Comm. v. Paige*, No. CV030198335S, 2004 Conn. Super. LEXIS 1922, at *12–19 (Conn. Super. Ct. July 14, 2004).

287. In addition, courts have held that an employer's reporting of immigrants to the immigration authorities (and perhaps even just the threat of reporting) in retaliation for any workplace complaint may be violations of anti-retaliation statutes. See Orrin Baird, *Undocumented Workers and the NLRA: Hoffman Plastic Compounds and Beyond*, 19 LAB. LAW. 153, 161 (2003) (noting that such behavior violates the NLRA).

288. See Cimini, *supra* note 116, at 407–08.

289. *Id.*; see also Cunningham-Parmeter, *supra* note 4, at 76 (2008) (noting that admitting immigration status may also constitute “direct evidence of criminal liability and deportability”).

290. Cunningham-Parmeter, *supra* note 4, at 76.

as the Fifth Amendment right against self-incrimination.²⁹¹

One potentially significant problem with a Fifth Amendment claim in immigrant-initiated cases, if the claim is even applicable,²⁹² is whether such a claim would result in a dismissal of the action.²⁹³ While the modern trend seems to be moving away from outright dismissal, such a result is theoretically possible.²⁹⁴ Another potential problem is whether judges would make negative inferences from the immigrant's refusal to testify, especially if the judge had previously deemed immigration status relevant *and* the action was initiated by the immigrant.²⁹⁵ Other options such as protective orders and motions in limine, though imperfect, are also potentially available to insulate the immigrant from unnecessary adverse consequences in the civil action or potential immigration proceedings and are discussed further in Part IV.A *infra*.

C. Ethical Constraints on the Judiciary

The Model Code of Judicial Conduct contains many of the same rules and regulations found in the Model Rules of Professional Conduct. As such, much of the discussion above regarding the ethical constraints on attorneys regarding status coercion could be applicable to judges depending on the context of the case. In the judicial context, when dealing with unauthorized immigrant status, the issue is not usually one of judicial unfairness or intentional mistreatment of unauthorized immigrants, but rather a misunderstanding of the intersection of civil law and procedure with that of immigration law.²⁹⁶ Such behavior is

291. *See id.* at 62 (proposing counseling the use of the Fifth Amendment in immigrant-initiated employment litigation and detailing policy grounds for extending the privilege to immigrants in civil litigation).

292. Many unauthorized immigrants would be able to avail themselves of the benefits of the Fifth Amendment because they will have committed some immigration-related crime such as entry without inspection, failing to register, reentry after removal, or some type of document fraud. *See id.* at 56.

293. *See* Cunningham-Parmeter, *supra* note 4, at 73–74; Eric Schnapper, *Righting Wrongs Against Immigrant Workers*, TRIAL, Mar. 2003, at 46, 54. Case law has generally treated defendants that invoke the Fifth Amendment differently than plaintiffs, as they have been loath to penalize individuals involved in a lawsuit that was not of their own choosing. Cunningham-Parmeter, *supra* note 4, at 73.

294. *Id.*, at 74 (noting that the practice of dismissing suits by plaintiffs who invoke the Fifth Amendment privilege has not “‘carried the day’” (quoting *McMullen v. Bay Ship Mgmt.*, 335 F.3d 215, 218 (3d Cir. 2003))).

295. Since *Baxter v. Palmigiano*, the Supreme Court has allowed courts to draw “adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.” 425 U.S. 308, 318 (1976). Some jurisdictions have passed laws that specifically prohibit judges from drawing any adverse inferences. *See* Cunningham-Parmeter, *supra* note 4, at 66.

296. In *Rico v. Rodriguez*, custody was awarded to the father, at least in part, on

generally not misconduct, but other more offensive behavior may be, and is typically easily identified.²⁹⁷

The most applicable rules from the Model Code of Judicial Conduct are Rule 1.2: *Promoting Confidence in the Judiciary*,²⁹⁸ Rule 2.2: *Impartiality and Fairness*,²⁹⁹ Rule 2.3: *Bias, Prejudice and Harassment*,³⁰⁰ and Rule 2.6, *Ensuring the Right to Be Heard*.³⁰¹ In addition, Rule 2.3 also requires judges to prohibit the lawyers practicing before them from engaging in biased or prejudicial fashion.³⁰² The underlying principles in each of the four rules above are the integrity and impartiality of the judiciary and the confidence with which its rulings are perceived by the general public, including unauthorized immigrants.³⁰³

A common query from the bench is whether the judges have an affirmative duty to report unauthorized immigrants to immigration authorities. One Florida family law judge who felt that he was required to report unauthorized immigrant children stated: “[t]hey’re violating the law, and I’m a judge. . . [d]on’t I have some type of obligation to the system to report it . . . when it’s smack-dab right out in front of me?”³⁰⁴

incorrect evidence that such an award would enhance the child’s immigration petition. *See Rico v. Rodriguez*, 120 P.3d 812, 816–17 (Nev. 2005).

297. *See* Thronson, *Of Borders and Best Interests*, *supra* note 70, at 54 (noting judicial statements of open bias such as “I have a problem with your immigration situation” (citing *In re M.M.*, 587 S.E.2d 825, 831 (Ga. Ct. App. 2003))); *see also* *People v. Phuong*, 679 N.E.2d 425, 428 (Ill. App. Ct. 1997) (chastising trial judge for discriminatory comments such as “[n]othing like a bench trial with a Chinese interpreter”).

298. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2008).

299. *Id.* R. 2.2.

300. *Id.* R. 2.3.

301. *Id.* R. 2.6.

302. *Tex. Employers’ Ins. Ass’n v. Guerrero*, 800 S.W.2d 859, 866 (Tex. Ct. App. 1990); MODEL CODE OF JUDICIAL CONDUCT R. 2.3(C). The *Guerrero* court emphasized the necessary role of trial judges in suppressing improper arguments. *Id.* at 868 (noting that the trial judge must not have “fully underst[oo]d the language of counsel, or he would not have permitted it,—would have rebuked it, and ought to have punished its author” (quoting *Moss v. Sanger*, 12 S.W. 619, 620 (Tex. 1889))).

303. “An independent, fair and impartial judiciary is indispensable to our system of justice.” MODEL CODE OF JUDICIAL CONDUCT Preamble para. 1. Judges must “strive to maintain and enhance confidence in the legal system.” *Id.* “Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety.” *Id.* R. 1.2 cmt. 1. Indeed, not all bias from reported decisions is anti-immigrant, and some judges have been found to have acted with perceived bias even though it is clear that no racial animosity existed, and the judge’s conduct was probably pro-immigrant. *See Mejia v. United States*, 916 A.2d 900, 903 (D.C. Cir. 2007) (reversing a conviction on the grounds that a judge’s musings, though potentially well-intentioned, created a perception of bias).

304. Associated Press, *Judge Accused of Abusing Power by Reporting Immigrant Children*, MIAMI HERALD, Jan. 19, 2004, at 8B. However the judge also acknowledged that he does not report every individual he suspects of being present without authorization. *A Judge Goes Too Far*, PALM BEACH POST, Jan. 26, 2004, available at <http://findarticles.com/>

The district's chief judge did not object to the practice but said that judges "must be mindful of action that harms the system."³⁰⁵ In fact, judges are not required to report unauthorized immigrant or any illegal activity they become aware of in the course of a proceeding, but are allowed to treat the matter as an issue of discretion.³⁰⁶

In using their discretion, judges are to weigh a number of circumstances, including the likelihood of injury if the reported misconduct goes unreported.³⁰⁷ The policy behind granting discretion to judges is that the "primary purpose of a legal proceeding is to ascertain the truth, and if litigants or witnesses know that the judge presiding at a trial is obligated to report illegal conduct revealed in the course of

p/articles/mi_8163/is_20040126/ai_n51824682/. In fact, the judge does not have a duty to report the illegal activity. See Fla. Ethics Advisory Comm., Op. 78-4 (1978). Other commentators have also reported on instances in which judges have contacted immigration authorities. See, e.g., Leslye E. Orloff et al., *Ensuring the Battered Immigrants Who Seek Help from the Justice System Are Not Reported to the INS*, in LESLYE E. ORLOFF & RACHEL LITTLE, *SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN*, A "HOW TO" MANUAL FOR BATTERED WOMEN'S ADVOCATES AND SERVICE PROVIDERS 278, 278-88 (1999).

305. *A Judge Goes too Far*, *supra* note 304.

306. Every judicial ethics advisory committee that has examined and reported on the issue has concluded that no affirmative obligation to report exists. Cynthia Gray, *A Judge's Obligation to Report Criminal Activity*, JUD. CONDUCT REP., Fall 1996, at 3; see, e.g., N.Y. Advisory Comm. on Judicial Ethics, Op. 05-84 (2005) (noting that while a judge must report misconduct by another judge or attorney who has violated the Code of Judicial Conduct or Rules of Professional Responsibility, no rule has been adopted regarding litigants or witnesses); see also Ala. Judicial Inquiry Comm'n, Op. 86-281 (1986) (no duty to report criminal offense discovered during course of trial); Ariz. Judicial Ethics Advisory Comm., Op. 92-15 (1992) (no duty to report "illegal activity"); Fla. Ethics Advisory Comm., Op. 78-4 (no duty to report illegal activity); Ill. Judicial Ethics Comm., Op. 02-01 (2002) (no duty to report illegal activity, though reporting is not prohibited); Me. Ethics Advisory Comm., Op. 01-1 (2001) (no duty to report illegal activity); Utah Ethics Advisory Comm., Op. 00-3 (2000) (no duty to report illegal activity); and Wash. Ethics Advisory Comm., Op. 02-9 (2002) (no duty to report illegal activity).

307. N.Y. Advisory Comm. on Judicial Ethics, Op. 03-110 (2004). In Illinois, the courts have enumerated the factors to include:

- (1) [T]he nature and seriousness of the offense;
- (2) conclusiveness of the information before the judge that a crime has been committed;
- (3) the recent, remote, or ongoing nature of the crime;
- (4) whether the crime has a victim and if so whether the victim is operating under a disability that would interfere [with][sic] the victim's ability to report the crime;
- (5) whether a danger to the community exists or the public trust is involved; and
- (6) whether the state's attorney or an assistant state's attorney was present when the information concerning the criminal activity was disclosed.

Ill. Judicial Ethics Comm., Op. 02-01.

litigation, [they] might be unwilling to testify truthfully.”³⁰⁸ In the only reported judicial ethics advisory committee opinion discussing a judge reporting an unauthorized immigrant, the opinion agreed with past precedent regarding knowledge of misconduct, and found that the matter is one for the judge’s discretion.³⁰⁹

Since judges are not required to report unauthorized immigrants, their dealings with them should be regulated solely by the applicable Judicial Code of Conduct. While racially inflammatory conduct is obviously prohibited,³¹⁰ judges should clearly delineate acceptable patterns of behavior in any civil setting involving unauthorized immigrants so as to promote the integrity and impartiality of the judiciary,³¹¹ and further undertake to learn relevant aspects of immigration law as appropriate.³¹² In the family law arena, decisions awarding custody or terminating parental rights on the basis of unauthorized immigrant status alone suggest a lack of impartiality and fairness, which should be central to every judicial proceeding, and which must be upheld to maintain confidence in the judiciary.³¹³

Judges allowing attorneys to engage in prejudicial conduct, which occurs in almost every instance of status coercion, appear to violate Rule 2.3(c), which requires the judges to maintain a courtroom free of bias, prejudice, and harassment.³¹⁴ While Rule 2.3(d) allows judges and lawyers to make legitimate references to race, national origin, ethnicity etc. when relevant,³¹⁵ the manner in which such evidence is presented should also conform to the applicable ethical standards and Rules of Evidence prohibiting unfair prejudice. Furthermore, in any case in which immigration status is introduced and not relevant, the judge should immediately act to prevent counsel from proceeding along a path whose sole purpose is to cloud issues and elicit an emotional response from the finder of fact.

308. N.Y. Advisory Comm. on Judicial Ethics, Op. 03-110.

309. N.Y. Advisory Comm. on Judicial Ethics, Op. 05-30 (2005).

310. See, e.g., *In re Goodfarb*, 880 P.2d 620, 623 (Ariz. 1994) (sanctioning a judge for using racially inflammatory language in court); see also *In re Schiff*, 635 N.E.2d 286, 287-88 (N.Y. 1994) (disciplining judges for purposefully disparaging Puerto Ricans in the presence of an Hispanic attorney).

311. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2008).

312. As the old saw goes, ignorance of the law is no defense. See *id.* R. 1.1 (duty to comply with the law); see also *In re Harshbarger*, 450 S.E.2d 667, 670 (W. Va. 1994) (noting that by accepting the position of judge, he had accepted the responsibility of becoming “learned in the law”).

313. MODEL CODE OF JUDICIAL CONDUCT R. 2.2.

314. *Id.* R. 2.3(C).

315. *Id.* R. 2.3(D).

Lastly, judges should be mindful of Rule 2.6's pronouncement that every person be accorded their lawful right to be heard.³¹⁶ Rule 2.6 may be involved if the judge unfairly attempts to encourage a settlement by invoking immigration status or implying that the party would be wise to settle given the unauthorized immigration status and potential adverse action that could be taken against him or her.³¹⁷ Even though such a statement may be accurate and the immigrant may indeed be reported to immigration authorities by the opposing party or opposing counsel,³¹⁸ such a statement is tantamount to telling the immigrant that this type of use of immigration status is sanctioned in that it succeeded in forcing a settlement. For the vast majority of cases, unauthorized immigration status is irrelevant to the underlying action, and for those which it is relevant, the immigrant should be allowed to continue his or her civil action without being pressured into a settlement solely or primarily on the basis of that status.³¹⁹

Therefore, while nearly all judges refrain from prejudicial conduct themselves, they should be aware that allowing biased conduct from the attorneys in their courtroom is also a violation of their Code of Judicial Conduct. Furthermore, in cases in which immigration status is involved, the judges should make early determinations as to relevancy and how the issue will be treated. Additionally, in some cases the judges might be required to inquire of practitioners or experts in immigration law if they are uncertain how it might affect their ruling, and especially if they are basing their decision on their understanding of immigration law. In any event, judges, in almost every instance except perhaps with violent offenders, should avoid affirmative referrals to immigration authorities because such referrals decrease access to the judicial system, reduce overall confidence in the system, and may be discriminatory if a judge selectively refers cases. While failure to follow these standards may be misconduct in some cases, the worse effect is that it might allow bias and prejudice into the courtroom, impugn the integrity of the court's rulings and further harm, under color of law, an already disadvantaged and vulnerable class of individuals.

316. *Id.* R. 2.3(D).

317. *Id.* R. 2.6(B).

318. Any attorney should be extremely cautious in reporting an opposing party to immigration authorities, as such conduct may likely violate the applicable Rules of Professional Conduct. *See supra* Part III.B.1. Further, opposing counsel should refrain from counseling their clients to engage in such conduct as that behavior would also likely violate the Rules of Professional Conduct. *See supra* Part III.B.1.g.

319. *See supra* Part III.B.1.b-d.

IV. REMEDIES

A. Civil Action Tactics

In civil proceedings, unauthorized immigrants' counsel has a variety of options to respond to status coercion depending on the setting, the stage of the proceeding, and the balance of the goals and fears of the client. The option of simply refraining from bringing a suit will not be discussed here as it essentially concedes the validity of using immigration status offensively in civil proceedings.

1. Protective Orders

Protective orders are available both during the discovery phase of any litigation,³²⁰ as well as through the trial and potentially beyond.³²¹ In *Centeno-Bernuy*, the court, in prohibiting the employer from contacting immigration and law enforcement authorities, noted specifically that as a result of the employer's conduct "[p]laintiffs are reluctant to appear in court to pursue their rights because they are afraid that [their employer] will immediately contact authorities and have them arrested and deported, thereby making it difficult, if not impossible, for them to pursue the [FLSA and wage and hour] litigation."³²² While at least one court has found that an order prohibiting contact with law enforcement authorities violates the reporter's First Amendment Rights,³²³ the *Centeno-Bernuy* court thought otherwise. The court concluded that the employer had "no constitutional right to make baseless accusations against plaintiffs to government authorities for the sole purpose of retaliating against the plaintiffs for filing the [action]."³²⁴

Courts that have ruled on protective orders regarding immigration status have commented at length regarding the policy behind granting

320. See, e.g., FED. R. CIV. P. 26(c)(1). Rule 26(c) provides that any person contesting discovery of an issue may move for a protective order after attempting to resolve the dispute with the other party. Courts, in their discretion and for good cause, may issue an order to protect a party from harassment, embarrassment, annoyance, etc. The protective order may "forbid[] inquiry into certain matters, or limit[] the scope of disclosure or discovery to certain matters." *Id.* at 26(c)(1)(D).

321. See, e.g., *Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 139 (W.D.N.Y. 2003) (granting a preliminary injunction prohibiting, on penalty of civil or criminal contempt, an employer from contacting immigration or other law enforcement authorities).

322. *Centeno-Bernuy*, 302 F. Supp. 2d at 135.

323. *In re Meredith*, 201 P.3d 1056, 1062–63 (Wash. Ct. App. 2009) (reversing a no contact protective order on First Amendment grounds noting that a "citizen does not lose the right to petition the government merely because his communication to the government contains some harassing or libelous statements").

324. *Centeno-Bernuy*, 302 F. Supp. 2d at 139.

them. In *Rivera*, the Ninth Circuit defended the protective order because to do otherwise would allow employers

to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action. Indeed, were we to direct the district courts to grant discovery requests for information related to immigration status in every case . . . under Title VII, countless acts of illegal and reprehensible conduct would go unreported.³²⁵

Allowing opposing parties to discover immigration status and related documentation has a demonstrable chilling effect on any immigrant party with a valid claim.³²⁶ One court went on to note “[t]here is an *in terrorem* effect to the production of such [immigration] documents. It is entirely likely that any undocumented class member forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face termination and/or potential deportation.”³²⁷ Consequently, allowing the discovery of immigration status is likely to deter valid claims of illegal activity, increase the potential for bias and prejudice in a hearing, and potentially have the “perverse effect of encouraging employers to hire undocumented workers” in order to continue evading responsibility for their own illegal actions.³²⁸

2. Motions In Limine

If immigration status is known or discovered prior to the commencement of trial, counsel could move in limine³²⁹ for an order

325. *Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1064–65 (9th Cir. 2004).

326. *Id.* at 1066.

327. *Flores v. Albertsons, Inc.*, No. CV0100515, 2002 WL 1163623, at *6 (C.D. Cal. Apr. 9, 2002); *see also* *Flores v. Amignon*, 233 F. Supp. 2d 462, 464–65 (E.D.N.Y. 2002) (granting protective order against discover of immigration status information on the grounds that, even if relevant, the information is far more prejudicial than probative).

328. *See* Frank Goldsmith, North Carolina Advocates for Justice Seminar, *The Ethical Implications of Discovery and Disclosure of Immigration Status*, 10 (Feb. 20, 2009); *see also* *Recinos-Recinos v. Express Forestry, Inc.*, No. CV A 05-1355, 2006 WL 197030, at *14 (E.D. La. Jan. 24, 2006) (granting protective order prohibiting discovery of irrelevant immigration status). *Contra* *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (holding where “plaintiff’s immigration status is relevant to prove a material aspect of the defense, a protective order [is] not . . . appropriate.”).

329. A motion in limine is a pretrial request that certain inadmissible evidence not be referred to or offered at trial. *BLACK’S LAW DICTIONARY* 804 (8th ed. 2004).

prohibiting opposing counsel from commenting or in any way mentioning immigration status.³³⁰ In deciding the motions in limine, courts generally rely on the same case law and public policy grounds as they do with protective orders.³³¹ When a motion in limine is appropriate, some commentators have suggested filing the motion in limine early in a proceeding in order to alert the court to the issue.³³²

3. Domestic Violence Protection Order

As mentioned above, one unauthorized immigrant was able to obtain a protective order that was to prevent her non-immigrant spouse from contacting law enforcement or immigration authorities.³³³ While the *Meredith* court struck down the order on First Amendment grounds, other states have more favorable law.³³⁴ Indeed, even the *Meredith* court noted that while the order sub judice was overly broad, a more narrowly tailored order may have withstood constitutional scrutiny.³³⁵ The *Meredith* court also implied that immigration authorities themselves may sanction a party who is attempting to use government complaints to harass.³³⁶

4. Modify or Limit Claims and Relief Sought

Since *Hoffman*, unauthorized immigrants are precluded from

330. See *Rodriguez v. Texan, Inc.*, No. 01 C 1478, 2002 WL 31061237, at *2–3 (N.D. Ill. Sept. 16, 2002) (granting plaintiff's motion in limine to exclude mention of plaintiff's immigration status); see also *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404, 406 (E.D.N.Y. 2004) (upholding magistrate's protective order and denial of defendant's motion in limine to introduce immigration-related evidence on the grounds that failure to do so "would significantly discourage employees from bringing actions against their employers who engage in discriminatory employment practices"). In *Gonzalez v. City of Franklin*, the Wisconsin Supreme Court upheld the granting of a motion in limine excluding evidence of immigration status due to the prejudicial effect it could have. 403 N.W.2d 747, 760–61 (Wis. 1987).

331. See *First Wireless*, 225 F.R.D. at 406–07; *Rodriguez*, 2002 WL 31061237, at *3.

332. See *Agosto & Ostrom*, *supra* note 32, at 402.

333. *In re Meredith*, 201 P.3d 1056 (Wash. Ct. App. 2009).

334. See, e.g., OHIO REV. CODE ANN. § 3113.31(E)(1)(h) (2009) (providing that judge may grant any relief that the court considers equitable and fair); see also RONALD B. ADRINE & ALEXANDRIA M. RUDEN, OHIO DOMESTIC VIOLENCE LAW § 18:20 (2009) (stating that, among other things, a judge may validly order that an individual not withdraw an application for permanent residency filed on behalf of the immigrant, that the individual may be ordered to "take all necessary action" in assisting the immigrant with the application, and finally, that an individual "may be enjoined from communication with any government agency including ICE or the Department of Homeland Security or a particular Embassy or Consulate about the [immigrant]").

335. *Meredith*, 201 P.3d at 1064 (remanding the case for a more narrowly tailored ruling).

336. *Id.*

seeking lost wages in NLRA cases,³³⁷ and opposing counsel has not been hesitant in trying to broaden *Hoffman's* scope.³³⁸ Additionally, by including lost wage claims the unauthorized immigrant's counsel may have unwittingly made immigration status relevant to the proceedings.³³⁹ By removing any claim for lost wages, counsel can remove the *Hoffman* issue from the dispute, and potentially therefore make immigration status irrelevant to the underlying proceeding.³⁴⁰

5. Settlement Agreement that Includes No Report Component

A potentially risky option if the matter proceeds to settlement is to include a no report component that would prohibit the non-immigrant party from contacting law enforcement or immigration authorities at any time post-settlement. Such agreements are likely to fall within ethical guidelines if initiated by the unauthorized immigrant, but may be subject to challenge regarding their enforceability.³⁴¹ Attorneys drafting this type of settlement agreement need to take care that the agreement does not, itself, constitute a crime such as compounding a crime³⁴² or is in any other way illegal.³⁴³ As the ABA Standing Committee on Ethics and Professional Responsibility has also agreed that lawyers may ethically participate in this type of agreement,³⁴⁴ it appears that, depending on the jurisdiction,³⁴⁵ such an agreement would be enforceable, and

337. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148–49 (2002).

338. See *supra* notes 106–108 and accompanying text.

339. See FED. R. EVID. 401; see also *Hoffman* 535 U.S. 137.

340. See Goldsmith, *supra* note 328, at 8 (noting additionally that in the cases where unlawfully terminated immigrants were able to find substitute employment fairly quickly, any claim for lost wages would likely be minimal and therefore minimally harmful to the client if omitted).

341. See Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 1995-13 (1995) (noting that such agreements may be ethically entered into, but that the client must be advised that "the entire settlement could be held void as contrary to public policy, even if the settlement is not in itself illegal"); see also 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1421 (1962). The North Carolina State Bar's ethics opinion contains no proviso regarding any potential unenforceability of this type of agreement. N.C. State Bar, Formal Ethics Op. 15 (2009). The ABA Standing Committee on Ethics and Professional Responsibility only noted that such an agreement may be unenforceable if there were a mandatory obligation to report or testify such as a subpoena or other court order. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363 (1992).

342. The crime of compounding typically requires knowledge by one party that another has committed an offense, and attempts to seek more than is due as fair restitution or indemnification in exchange for not reporting the crime. ABA Comm. on Prof'l Ethics, Formal Op. 92-363 (1992); see also N.Y. PENAL LAW § 215.45 (2000).

343. See N.C. State Bar, Formal Ethics Op. 15 (2009).

344. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-363.

345. New York is of obvious concern given the fact that their ethics opinion notes the

furthermore should not be subject to the First Amendment claims presented in protective order litigation.³⁴⁶

6. Bifurcated Trial

Some courts have utilized a bifurcation process separating trials involving unauthorized immigration status into guilt and damages phases, allowing evidence of immigration status only in the damages phase, in order to remove any potential prejudice from the adjudicative phase.³⁴⁷ In one case, a defendant sought bifurcation arguing that the unauthorized immigrant plaintiff might otherwise benefit from “undue sympathy.”³⁴⁸ At the appellate court level in *Salas*, the court of appeals seemed to indicate that the plaintiff was at fault for failing to request bifurcation in order to mitigate any potential prejudice.³⁴⁹ This decision was unequivocally overruled on appeal.³⁵⁰

7. Motion for Summary Judgment

In most cases, if opposing counsel or the opposing party reports the unauthorized immigrant’s status to immigration authorities, summary judgment would not be the typical remedy.³⁵¹ However, that may not be the case where the reporting of the immigrant is done in retaliation of a protected employment activity.³⁵² If the retaliatory conduct adversely

issue of potential unenforceability must be disclosed to the client. Ass’n of the Bar of the City of N.Y. Comm. on Prof’l and Judicial Ethics, Formal Op. 1995-13 (1995).

346. See *supra* notes 333–336 and accompanying text.

347. See, e.g., *Yu G. Ke v. Saigon Grill, Inc.*, 595 F. Supp. 2d 240, 264 (S.D.N.Y. 2008); *Melendres v. Soales*, 306 N.W. 2d 399, 402 (Mich. Ct. App. 1981); see also Mariel Martinez, Comment, *The Hoffman Aftermath: Analyzing the Plight of the Undocumented Worker Through a Wider Lens*, 7 U. PA. J. LAB. & EMP. L. 661, 690–91 (2005) (suggesting that bifurcation may help refocus finders of fact on the issue of liability rather than ancillary questions of immigration status).

348. *Lewis v. City of N.Y.*, 689 F. Supp. 2d 417, 429 (E.D.N.Y. 2010). In *Lewis*, however, it is likely that the “undue sympathy,” if any, was a result of extensive medical injuries, not immigration status. *Id.*

349. *Salas v. Hi-Tech Erectors*, 177 P.3d 769, 774 (Wash. Ct. App. 2008), *rev’d*, 230 P.3d 583 (Wash. 2010). The court noted that, although plaintiff had in fact moved in limine to exclude evidence of immigration status, he should have further moved to limit discussion of immigration status to lost wages. *Id.*

350. *Salas*, 230 P.3d at 587 (holding that the trial court decision in denying the motion in limine and allowing evidence of immigration status was “based on untenable reasons . . . [and] an abuse of discretion.”).

351. Motions for summary judgment are granted only when there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

352. See, e.g., *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 103 F. Supp. 2d 1180, 1182, 1186 (N.D. Cal. 2000) (granting summary judgment to the immigrant for FLSA and other wage claims after former employer reported her to immigration authorities the next

affects the employee and was primarily caused by the protected activity, summary judgment may be the appropriate remedy for the immigrant.³⁵³

8. Additional Miscellaneous Approaches

There are a variety of other options available depending on the circumstances involved. Depending on the case and jurisdiction, filing suit under a pseudonym may be an option acceptable to the unauthorized immigrant.³⁵⁴ Additionally, confidentiality agreements are a possibility, though in some cases they will inspire little faith in the unauthorized immigrant if the opposing party has already demonstrated a willingness to coercively use immigration status.³⁵⁵ Finally, depending on the severity of misconduct regarding immigration status, counsel could also move for a mistrial.³⁵⁶

B. Immigration Court Tactics

While the unauthorized immigrant may have a fairly versatile set of options in a civil proceeding, his or her options in immigration court, should he or she be placed in removal proceedings will be very limited. Assuming that the individual is indeed removable and does not qualify for any relief from removal or has already been removed, the basic options are: 1) continuances; 2) deferred action; 3) parole; and 4) stay of removal.

1. Continuances

The simplest technique for the unauthorized immigrant to prolong his or her stay in the United States is a motion to continue.³⁵⁷ Unlike

business day after the first pre-hearing conference regarding the wage claims).

353. *Id.* at 1186.

354. *See* Lozano v. City of Hazelton, 496 F. Supp. 2d 477, 504–05 (M.D. Pa. 2007) (allowing anonymous filing to protect immigration status information). Some jurisdictions have specific rules governing filing via a pseudonym. *See* James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993) (establishing factors upon which a court should decide whether or not to allow anonymous filing).

355. *See* Serrano v. Underground Utils. Corp., 970 A.2d 1054, 1058–59 (N.J. Super. App. Div. 2009) (alleging that employer failed to pay employees for two to three hours of work per day while requiring six day workweeks, and also alleging that the employer failed to pay the prevailing wage); *see also* Montoya v. S.C.C.P. Painting Contractors, Inc., 530 F. Supp. 2d 746, 749 (D. Md. 2008) (stating “[e]ven if the parties were to enter into a confidentiality agreement restricting the disclosure of such discovery [on immigration status] . . . there would still remain ‘the danger of intimidation, the danger of destroying the cause of action’ and would inhibit plaintiffs in pursuing their rights.” (quoting Liu v. Donna Karan Int’l, Inc., 207 F. Supp. 2d 191, 193 (2002))).

356. *See* Agosto & Ostrom, *supra* note 32, at 402.

357. The motion to continue will be of little use to the unauthorized immigrant if he or

civil proceedings in which a continuance may be sought orally, immigration judges generally require written motions to be filed.³⁵⁸ In the motion to continue, counsel should set forth the reason for the motion, accompanied by evidence of the same, and suggest a date for the rescheduled hearing.³⁵⁹ The immigration judge, in his or her discretion may grant the motion “for good cause shown.”³⁶⁰ This option may be more or less attractive to the unauthorized immigrant depending on the progress of the immigrant’s civil action or dispute, as well as whether or not the immigrant is being detained. For any case in which the civil action is very near resolution and the immigrant has not been detained, the motion to continue should be the first course of relief sought.

2. Deferred Action

Deferred action, the ICE equivalent of prosecutorial discretion,³⁶¹ is relief which allows the unauthorized immigrant to remain in the United States.³⁶² In a sense, it acts as an informal stay of removal.³⁶³ Historically, deferred action has been difficult to obtain.³⁶⁴ While no formal guidelines exist since the retraction of the Operations Instruction in 1997,³⁶⁵ several INS/DHS interoffice memoranda exist which set forth

she is detained. In the case of detention, the unauthorized immigrant will need to seek conditional parole. *See infra* Part IV.B.3 and accompanying text.

358. OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL 96 (2008), *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm.

359. *Id.*

360. 8 C.F.R. § 1003.29 (2010).

361. *See id.* § 274a.12(c)(14) (defining deferred action as “an act of administrative convenience to the government which gives some cases lower priority”); *see also* ANNA MARIE GALLAGHER & MARIA BALDINI-POTERMIN, IMMIGRATION TRIAL HANDBOOK § 2:11 (2009).

362. Counsel for the unauthorized immigrant may seek deferred action at any time in the proceeding, however once immigration proceedings have commenced, ICE must move to dismiss the action in court as by that time jurisdiction of the case has vested with the immigration judge. 8 C.F.R. § 239.2. Until jurisdiction of the case has vested with the immigration judge, ICE may unilaterally cancel the notice to appear, but ICE may not act unilaterally after it has issued the notice to appear. *Id.* This situation presents immigrants with the conundrum that they may not be able to obtain deferred action as the best time to request it is prior to the notice to appear being issued; however, if the notice to appear has not been issued, the immigrants may be loath to call ICE attention to themselves on the slim chance of receiving this benefit.

363. *See Siverts v. Craig*, 602 F. Supp. 50, 53 (D. Haw. 1985) (defining deferred action as “an informal administrative stay of deportation”).

364. *See* 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 72.03[2][h] (2010).

365. INS Operations Instruction 242.1(a)(22) was removed in 1997. GALLAGHER &

factors for determining whether to grant discretion.³⁶⁶ Both memoranda cited above enumerate certain factors such as legal permanent resident status, criminal history, humanitarian concerns, the likelihood of removal, past cooperation with authorities, military service, fairness, and efficiency.³⁶⁷

In terms of seeking deferred action due to an unresolved civil dispute, certain cases will likely receive more favorable treatment than others. Given the guidelines' stated criteria of humanitarian concerns and efficiency, cases of marital dissolution or custody proceedings where the non-immigrant has used status coercion to gain an unfair advantage, especially if the case is one of domestic abuse, and workplace cases involving wrongful termination due to unlawful discrimination or prohibited retaliatory conduct may have a greater chance of success. As deferred action, like any grant of prosecutorial discretion, exists primarily to allow ICE to make the best use of their resources, unauthorized immigrants faced with status coercion in appropriate cases should make the argument that they have already been taken advantage of, and allowing the status coercer to use the immigration process against the immigrant perverts any notion of fairness or humanitarian concerns.

3. Parole

If an unauthorized immigrant has been detained by DHS, the unauthorized immigrant may be eligible for conditional parole prior to the conclusion of any removal hearing.³⁶⁸ While the remedy is fairly limited in scope, if granted, the immigrant would be allowed to remain in the United States until his or her immigration case was adjudicated, allowing him or her to pursue the civil action. If parole is granted, DHS, in its discretion, may revoke this parole at any time.³⁶⁹

If the unauthorized immigrant has already been removed, the immigrant may apply for parole to reenter the country if he or she is

BALDINI-POTERMIN, *supra* note 361, at § 2:12.

366. See Memorandum from Doris Meissner, Comm'r, INS, to Reg'l Dirs., Dist. Dirs., Chief Patrol Agents, & Reg'l & Dist. Counsel 7-9 (Nov. 17, 2000); Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, to All OPLA Chief Counsel 3-6 (Oct. 24, 2005). The memoranda are nonbinding on DHS.

367. See sources cited *supra* note 366.

368. 8 U.S.C. § 1226(a)(2)(B) (2006). In some cases, particularly for aggravated felons, detention is mandatory while removal proceedings are pending. § 1226(c). Additionally, parole under § 236 is limited to aliens who are "lawfully admitted," and further, only if DHS is satisfied that that immigrant "would not likely pose a danger to property or persons and . . . is likely to appear for any future proceedings." 8 C.F.R. § 236(c)(8) (2010).

369. 8 C.F.R. § 236(c)(9).

able to demonstrate “urgent humanitarian reasons” or “significant public benefit.”³⁷⁰ Provided that the immigrant is not being removed pursuant to § 235 (expedited removal),³⁷¹ DHS may grant parole subject to certain conditions. In considering which conditions to apply, DHS considers all relevant factors which include: 1) the giving of an undertaking or bond; 2) community ties; and 3) agreement to reasonable conditions.³⁷² For those immigrants subject to removal under § 235, the eligibility is restricted to those who, in addition to the humanitarian or public benefit reasons, are able to show that they do not present a security risk or risk of absconding, and further, that they fall within one of the delineated groups which includes: “[a]liens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States.”³⁷³

Given the higher barrier for parole for individuals subject to § 235 expedited removal,³⁷⁴ an alien not subject to expedited removal should also be able to use to his or her advantage the ongoing civil action and the fact that the immigrant will most likely appear as a witness in the proceeding. Typically, this type of parole will terminate “upon accomplishment of the purpose for which [it] was authorized.”³⁷⁵

4. Stays of Removal

While in most instances, a stay of removal would be inapplicable to an unauthorized immigrant for the purpose of pursuing litigation, if the immigrant is also testifying against an individual in any state or federal prosecution, the immigrant may apply to DHS for a stay of removal.³⁷⁶ The grant of the stay is discretionary, and DHS will generally also consider the same factors pertinent to a determination of whether or not to parole an immigrant seeking admission.³⁷⁷ While this remedy is effective, its limited scope may render its utility to be negligible for maintaining presence to pursue or contest a civil action.

370. 8 U.S.C. § 1182(d)(5).

371. See 8 U.S.C. § 1225(b).

372. 8 C.F.R. § 212.5(d)(1)-(3).

373. 8 C.F.R. § 212.5(b)(5).

374. *Id.* While the *Code of Federal Regulations* repeats the phrases “urgent humanitarian reasons” and “significant public benefit” in addition to adding the security risk and risk of absconding language, 8 C.F.R. § 212.5(b), it also provides simply that DHS may parole the immigrant “in accordance with section 212(d)(5)(A) . . . as he or she may deem appropriate.” 8 C.F.R. § 212.5(c).

375. *Id.* § 212.5(e)(2).

376. See 8 U.S.C. § 1231(c)(2)(A)(ii).

377. See *id.* § 1182(d)(5)(A); 8 C.F.R. § 241.6(a) (citing as factors for consideration § 241(c) of the INA and 8 C.F.R. § 212.5 – *Parole of aliens into the United States*).

V. CONCLUSION

Considering the fact that status coercion is an attempt to gain advantage over another in a civil dispute by threatening, in the eyes of the immigrant, a significant punishment, it appears that it should be considered more offensive than actually is the case. As with Damocles, the sword of removal is ever-present for unauthorized immigrants, and in many cases the threat of removal is the primary reason these immigrants forego a legal remedy to which they are entitled. Were the threatened punishment the bringing of criminal charges or a disciplinary complaint, such behavior would clearly be proscribed,³⁷⁸ and furthermore, nearly every attorney knows that such behavior is ethically prohibited. However, given the prevalence of status coercion in civil disputes, it appears that many attorneys either distinguish the threat of removal from a criminal complaint, or given the vulnerability of the targeted individual, believe that such action may be taken with impunity under the guise of zealous advocacy.

Neither position is legally tenable. When immigration status is irrelevant to the underlying proceeding, an attorney may be violating a half dozen or more rules of professional conduct.³⁷⁹ Even when immigration status is relevant to the proceeding, if opposing counsel attempts to use such information coercively, he or she is still likely violating several rules including the improper use of judicial proceedings and conduct prejudicial to the administration of justice.³⁸⁰ To date, only one state has adopted a specific legal opinion prohibiting the threatened use of reporting immigration status as well as the actual reporting of the immigrant to ICE without any threat.³⁸¹ While the general ethical rules of the remaining forty-nine states should be construed as covering status coercion as detailed above,³⁸² these states should also consider adopting specific ethics opinions for the explicit purpose of stating unequivocally to the practicing bench and bar that such behavior is not permissible.

What then of the homeowner example cited in the introduction? As no attorney was involved on behalf of the aggrieved purchaser, the only remedy against a lay individual may be the crime of criminal extortion. Even then, the aggrieved potential purchaser could assert the exception or affirmative defense “if the [potential purchaser] reasonably believed the threatened charge to be true and that [her] sole purpose was to

378. *See supra* Part III.B.1.e.

379. *See supra* Part III.B.

380. *See supra* Part III.B.1.c. & d.

381. *See supra* note 54 and accompanying text.

382. *See supra* Part III.

compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge.”³⁸³ It is not clear from the facts that the vindictive potential purchaser was being anything other than vindictive in seeking the unauthorized immigrant’s expulsion from the country. Her action in reporting may then qualify as compelling the unauthorized immigrant to correct the wrong of unlawful presence. Sadly then, this particular case may therefore lie in the category of actions which are morally repugnant but not yet criminal; however, as the vast majority of status coercion cases tend to revolve around an attempt at gain, it is likely that other similar actors may run afoul of the law.

Additionally, the judiciary must act to prevent such tactics from occurring in their courtrooms. From discovery through trial and beyond, the judges should be mindful of the ethical implications of status coercion, and they should be prepared to utilize protective orders, grant motions in limine preventing the use of immigration status in court, refuse to admit evidence that is unduly prejudicial, bifurcate trials when necessary, and generally take any action necessary to ensure the administration of justice to a vulnerable population.

While this paper has focused on a more mechanical examination of criminal and ethical rules that govern conduct that would be considered status coercion, there is a larger, deontological question as well. While beyond the scope of this article, the author has been struck by the clamor of the arguments on either side of the divide (which largely mirror the overarching themes in immigration reform or enforcement) as to why each side is correct with regard to adherence to natural “rules” and “duties.” I do not believe the argument as to natural law is as close an issue as some would suggest. It seems clearly inimical to suggest a *natural* law that would countenance vindictive or extortionary behavior which serves no greater societal good, benefits a perceived bad actor, and is only justifiable on the grounds that all laws must be enforced even if the unlawful conduct is entirely unrelated to the separate civil dispute at issue.

The ultimate conclusion then, is that while there are tactics to combat the effectiveness of status coercion in both civil and immigration proceedings,³⁸⁴ such tactics should be unnecessary. Attorneys who engage in extortionary behavior based on immigration status impugn the credibility and quality of the judicial system, and thereby undermine its effectiveness. Unauthorized immigrants who believe they will be

383. N.Y. PENAL LAW § 155.15(2) (2010).

384. See *supra* Part IV.

subjected to such behavior are less likely to report misconduct and attempt to enforce their own rights. Therefore, allowing status coercion in civil proceedings perversely incentivizes attorneys and their clients to further engage in negative and sometimes unlawful treatment of unauthorized immigrants. The attorneys responsible for these actions should be sanctioned for ethical misconduct. In order for that to happen, attorneys need to earnestly self-police,³⁸⁵ and the disciplinary bodies tasked with enforcing ethical conduct need to appropriately apply the ethical standards. Promulgating new, specifically-tailored opinions regarding the inappropriateness of status coercion will grant the disciplinary bodies the dual advantage of irrefutably clear law and prior notice.

385. MODEL RULES OF PROF'L CONDUCT R. 8.3 (2010) (requiring attorneys to report other lawyers' or judges' violations of the Rules of Professional Conduct).